No. 99-1132-CSY Title: Illinois, Petitioner
v.
Charles McArthur

Docketed: January 5, 2000 Court: Appellate Court of Illinois, Fourth District

Entry	Date	Proceedings and Orders
	Jan 4 2000	Petition for writ of certiorari filed. (Response due February 4, 2000)
	Feb 16 2000	DISTRIBUTED for Conference of March 3, 2000
	Feb 25 2000	Response requested.
	Mar 27 2000	Brief of respondent Charles McArthur in opposition filed.
	Apr 5 2000	Reply brief of petitioner Illinois filed.
	Apr 12 2000	REDISTRIBUTED for Conference of April 28, 2000
	May 1 2000	Petition GRANTED. SET FOR ARGUMENT November 1, 2000. **********
	May 11 2000	Record filed.
	Jun 2 2000	Order extending time to file brief of petitioner on the merits until July 13, 2000.
	Jun 12 2000	Joint appendix filed.
	Jul 13 2000	Brief amicus curiae of United States filed.
	Jul 13 2000	Brief amici curiae of Ohio, et al. filed.
	Jul 13 2000	Brief of petitioner Illinois filed.
	Jul 19 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 8 2000	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 14 2000	Brief amicus curiae of Rutherford Institute filed.
	Aug 14 2000	Brief of respondent Charles McArthur filed.
	Sep 20 2000	Reply brief of petitioner Illinois filed.
	Sep 22 2000	CIRCULATED.
	Sep 25 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument distributed.
	Sep 26 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 1 2000	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether it is constitutionally reasonable for police officers to secure a residence from the outside, and prohibit the occupant's entry into that residence for a short time while they obtain a search warrant based on probable cause, when this Court has suggested that that is reasonable under the Fourth Amendment in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984) and other courts have found similar behavior consistent with the Fourth Amendment, and *Segura*.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, INCORRECTLY FOUND THAT *SEGURA* DID NOT ALLOW THE IMPOUNDMENT OF RESPONDENT'S RESIDENCE AND THE DENIAL OF ACCESS TO HIM WHILE AWAITING A SEARCH WARRANT BASED ON PROBABLE CAUSE	5
CONCLUSION	15
APPENDIX	*infra*

TABLE OF AUTHORITIES

United States Supreme Court Cases:	PAGE(S)
Florida v. Jimeno, 500 U.S. 248, 114 L.Ed.2d 297, 111 S.Ct. 1801 (1991)	10
Segura v. United States, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984)	i, 3, 5, 6, 7, 8
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989)	9
Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)	10
United States v. Jacobsen, 466 U.S. 109, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984)	9, 10
United States v. Place, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983)	9, 10
Other Cases:	
Ferdin v. Superior Court, 36 Cal. App. 3d 774, 112 Cal. Rptr. 66 (1974)	13
People v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999)	1, 3, 4, 9

United States v. Crespo de Llano,
838 F.2d 1006 (9th Cir. 1987) 13, 14

United States v. Roby,
122 F.3d 1120 (8th Cir. 1997) 13

United States v. Veillette,
778 F.2d 899 (1st Cir. 1985) 12

Additional Authority:

LaFave, SEARCH AND SEIZURE,
3rd ed., Vol. III, sec. 6.5(c)
(1996) 6, 9

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully asks this Court to issue a writ of certiorari to the Appellate Court of Illinois, Fourth District, to review that court's judgment and opinion entered on May 7, 1999.

OPINION BELOW

The Appellate Court of Illinois, Fourth District, issued its opinion in this case on May 7, 1999. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999). This decision is reprinted in the appendix to this petition. The October 6, 1999, order of the Illinois Supreme Court, denying Illinois' Petition for Leave to Appeal, is also reprinted in the appendix to this petition. *People v. McArthur*, 1999 Ill. LEXIS 1246 (Ill. Oct. 6, 1999).

JURISDICTION

The Appellate Court of Illinois, Fourth District, entered its judgment on May 7, 1999, and the Illinois Supreme Court denied Illinois' Petition for Leave to Appeal on October 6, 1999. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), since, in the proceedings in the state courts of Illinois, the Respondent asserted an alleged violation of his rights arising under the United States Constitution.

STATEMENT OF THE CASE

On April 2, 1997, Sullivan, Illinois police officers accompanied Tera McArthur to her trailer to remove belongings from her home which she shared with her husband, the Respondent, Charles McArthur. (R. 4). After Tera removed her belongings, she informed Officer John Love, who was standing on the porch, that Respondent had "pot" in the trailer under the couch. Love knocked on the door and, when Respondent answered, Love told him Tera had said that he had drugs in the trailer. Respondent denied he had drugs in the trailer and denied Love's request to search the trailer for drugs without a warrant. At that point, Respondent had stepped outside, and was standing on the porch of the trailer. Tera agreed to go with another officer to testify before a judge to secure a warrant. (R. 5-6). From that point, Officer Love did not allow Respondent to re-enter the trailer unless accompanied by an officer. (R. 7). Respondent testified that he asked if he could wait inside the trailer by himself while the warrant was being sought, and that Love told him that he could not enter unless there was an officer present. (R. 17-18). Love did allow Respondent to re-enter to get cigarettes and make telephone calls. However, on these occasions, Love stepped "right inside the door," but, according to Respondent, did not conduct a search. (R. 8, 22). While waiting for the warrant, no officer told Respondent that he was under arrest, placed him in handcuffs, or told him that he was not free to leave. (R. 12).

When the police returned with the warrant about one to two hours later, Respondent entered the trailer and showed them where the drugs were located. Respondent was arrested, searched and handcuffed. (R. 13, 20). Respondent agreed that, if he had been allowed to enter the residence while waiting for the warrant, he would have destroyed the contraband. (R. 18). After Respondent was charged with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of a substance containing less than 2.5 grams of cannabis (720 ILCS 600/3.5(a); 550/4(a) (West 1996)), he filed a motion to suppress the evidence found at the residence during the execution of a valid search warrant. (C. 39-41). Respondent argued that his Fourth Amendment rights were violated because the police secured his residence and prevented him from re-entering his residence alone during the two hours it took to obtain the search warrant. The trial court granted Respondent's motion to suppress. (R. 35, C. 80-81). Petitioner appealed, and the Fourth District appellate court affirmed. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999).

The Fourth District appellate court found that this case represented a situation which was not addressed in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984); that is, if a person can be denied access to his home where it is secured from the outside based on probable cause while a search warrant is being obtained. The court acknowledged that both the *Segura* majority and the dissent implied that securing a residence from the outside when probable cause exists may not violate the Fourth Amendment's prohibition against unreasonable seizures, but found that *Segura* did not address whether police, when securing a residence, may limit the "freedom of movement of persons within, into or out of" the secured premises. *McArthur*, 713 N.E.2d at 96. The court found that, even

though there was probable cause, since Respondent came onto the porch and never left the premises, this case involved a "constructive eviction." In so holding, the court distinguished this case from the situation where the "defendant resident is not on the premises when police arrive to secure the residence from the outside while seeking a search warrant; that is, where police, with probable cause, secure a residence and do not permit anyone arriving at the premises (from the outside) entrance into the residence." *McArthur*, 713 N.E.2d at 98.[1] The court further found that the police carried out an unlawful search when an officer stood in the doorway of the trailer, with Respondent's foreknowledge, after he entered to make telephone calls and get cigarettes.

The court concluded that there was no authority for the police action in this case, finding that the police conduct in securing Respondent's residence while awaiting the search warrant was an unreasonable seizure (and probably an unreasonable search) under the Fourth Amendment so that the evidence discovered in the residence upon execution of the search warrant was properly suppressed. *McArthur*, 713 N.E.2d at 98-99.

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[1] Although the court appeared to make this distinction here, earlier in its decision the court stated that this was not one of the three situations where it would be permissible for police to secure a residence from the outside while seeking a warrant, and bar access to that residence, finding that *Segura* only allows this when the only persons who could claim access: 1) are already in custody; 2) are subject to arrest when they appear; or 3) have consented to remain outside. *McArthur*, 713 N.E.2d at 98.

Petitioner filed a timely Petition for Leave to Appeal to the Illinois Supreme Court. On October 6, 1999, the Illinois Supreme Court denied the Petition for Leave to Appeal. On November 5, 1999, the Illinois Supreme Court granted the State's motion to stay issuance of the mandate.

Petitioner, the People of the State of Illinois, now seeks a writ of certiorari from this Court to review the judgment and opinion of the Appellate Court of Illinois, Fourth District.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, INCORRECTLY FOUND THAT *SEGURA* DID NOT ALLOW THE IMPOUNDMENT OF RESPONDENT'S RESIDENCE OR THE DENIAL OF ACCESS TO HIM WHILE AWAITING A SEARCH WARRANT BASED ON PROBABLE CAUSE.

The Illinois Appellate Court's opinion in this case misconstrues and unjustifiably limits this Court's holding in *Segura v. United States*, 468 U.S. 796, 82 L.Ed.2d 599 104 S.Ct. 3380 (1984), and conflicts with the federal and state courts which have determined if one's possessory interests can be interfered with while police are awaiting a search warrant based on probable cause under *Segura*. Both the majority and the dissent in *Segura* agreed that securing a residence from the outside when probable cause exists may not violate the Fourth Amendment's prohibition against unreasonable seizures. While *Segura* does not specifically address the question of the extent to which one's possessory interests can be interfered with to achieve that result, the

appellate court's finding of a Fourth Amendment violation is wrong, and this Court must address this important question. In *Segura*, this Court observed that "different interests are implicated by a seizure than by a search." A seizure affects only the person's possessory interests; a search affects a person's privacy interests. *Segura*, 468 U.S. at 806. A seizure of a dwelling prior to the execution of a warrant is allowable where there is probable cause unconnected with the seizure. *Segura*, 468 U.S. at 811-812. Recognizing the "generally less intrusive nature of a seizure [citation omitted], the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible." *Segura*, 468 U.S. at 806.

While the *Segura* Court was severely divided—four justices dissented—and the opinion, written by Chief Justice Burger, was joined only by Justice O'Connor in the part (part IV) that expressly found that securing the defendant's apartment from the inside was a lawful seizure (*Segura*, 468 U.S. at 798), one rule of law is clear from the decision in *Segura*. Professor LaFave in his careful analysis of *Segura, in toto*, concluded, *inter alia*: "All members of the Court appear to agree that the mere seizure of the premises and contents (that is, a mere interference with possessory interests) is permissible on probable cause even absent exigent circumstances." *LaFave*, SEARCH AND SEIZURE, 3rd ed., Vol. III, sec 6.5(c), 366 (1996).

In part IV of *Segura*, the Chief Justice, joined by Justice O"Connor, wrote: "We hold, therefore, that securing a dwelling, on the basis of probable cause, to

prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or it contents." *Segura*, 468 U.S. at 810. In the dissent's view, the officers' seizure of the residence from the inside without a warrant and in the absence of exigent circumstances "was constitutionally unreasonable from the moment it began." *Segura*, 468 U.S. at 824. (Stevens, J., dissenting, joined by Brennan, Marshall and Blackmun, JJ). However, in the accompanying footnote, Justice Stevens wrote:

> Since these premises were impounded 'from the inside,' I assume impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter.

Segura, 468 U.S. at 824, n. 15.

Thus, six of the justices expressly considered external impoundment to be constitutionally permissible when based on probable cause and when a search warrant is being sought.

The remaining three justices (White, Powell, and Rehnquist, JJ) who, along with Justice O'Connor, joined the Chief Justice in part V of the opinion, agreed, at least implicitly. *Segura*, 468 U.S. at 810, 814. After noting that the evidence at issue was admissible under the independent source doctrine and explaining that the untainted search warrant "was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry," (*Segura*, 468 U.S. at 814), the five-justice majority wrote:

> Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here.

Segura, 468 U.S. at 814.

Clearly, the five majority justices considered that such a means of discovering evidence would raise no doubt about its passing constitutional muster. Thus, all members of the *Segura* Court agreed that a purely external seizure of a residence and its contents based on probable cause is permitted by the Fourth Amendment. The right of exclusion necessarily flows from the right to seize a residence and its contents from the outside based on probable cause. That this concomitant right exists is clear from the statement that the evidence would have been discovered as if the police had established "a perimeter stakeout to prevent *anyone* from entering and destroying evidence." *Segura*, 468 U.S. at 814 (emphasis added). An external impoundment would, by definition, include some type of possessory interference. This Court must more clearly define the extent that interference is reasonable, as courts, as shown here, are wrongly interpreting *Segura*.

Here, the Illinois Appellate Court found that this Court's opinion in *Segura* allowed only a warrantless seizure and securing of a residence based on probable cause while obtaining a warrant, and barring access to that residence, if one of three situations was present. Citing *LaFave*, the Illinois Appellate Court stated that *Segura* allows only denial of access when the only persons who could claim access: 1) are already in custody; 2) are subject to arrest when they appear; or 3) have consented to remain outside. *McArthur*, 713 N.E.2d at 98. However, the section of *LaFave* cited for this proposition merely was an overview of the cases that actually have addressed the issue, and was limited to their specific facts. *LaFave* goes on to say that "[the cases] thus do not unquestionably resolve the issue whether, for example in [citation] the police could have lawfully barred the defendant's mother and brother from entering their own home." *LaFave*, SEARCH AND SEIZURE, 3rd ed., Vol. III, sec. 6.5(c), 363 (1996). The fact that the question is not resolved is the reason that it must be decided by this Honorable Court.

As stated above, the Illinois Appellate Court erred in finding that the limited interference with Respondent's possessory interests here was unreasonable. A seizure of property occurs when governmental authorities exert dominion and control over property for their own purposes. *United States v. Jacobsen*, 466 U.S. 109, 120-121, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984). However, "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. (Citation) What is reasonable, of course 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner v. Railway Executives' Ass'n*, 489 U.S. 602, 619, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989). There is no prohibition on a seizure of property to prevent loss or destruction of suspected contraband, as long as a warrant is obtained before the contents are examined. See *United States v. Place*, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983). If it is apparent that the property [or container] contains contraband, the seizure may be consti-

tutionally reasonable. Some seizures can be justified by an articulable suspicion of criminal activity. See *Place*, 462 U.S. at 702. Essentially, *Place* and *Jacobsen* hold that: (1) A seizure lawful at its inception can nonetheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests by, for example, converting a temporary deprivation into a permanent one; and (2) When possessory interests are affected, the reasonableness of the conduct must be balanced between the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. Also, the circumstances surrounding the seizure must be examined, including when the seizure is made and how it is carried out. That balancing requires inquiry into "whether the totality of the circumstances justified a particular sort of search or seizure." This case-specific balancing is consistent with a long line of this Court's decisions. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Even where an exception to the warrant requirement applies, searches and seizures can only be made upon probable cause and must be reasonable. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250, 114 L.Ed.2d 297, 111 S.Ct. 1801 (1991).

In this case, there unquestionably was probable cause, and the seizure, at its inception, was reasonable. The next question, whether the police conduct was reasonable under the Fourth Amendment, must be answered in the affirmative. The nature of the seizure was very limited. Respondent was merely not allowed access to his house for the short time that it would take

to obtain the warrant. Furthermore, the governmental interest was great. Respondent agreed that, if allowed to re-enter his house, he would destroy the contraband. In determining reasonableness, we can ask, "What else could the police do here?" The police did nothing more than was required and necessary to affect a seizure based on probable cause. Here, the officers, having probable cause that evidence was in Respondent's residence and believing that he would destroy it if he could, did what was reasonable. Instead of bursting in only to learn later that no exigent circumstances justified their entry, these officers seized the residence from the outside, prevented Respondent from entering and immediately sought a search warrant.[2] This was reasonable.

This Court must clarify what is a reasonable seizure while police await a warrant based on probable cause, and to what extent police may limit the freedom of movement of persons within, into or out of impounded premises. This Court must decide the issue of just how great an intrusion is involved in the impoundment procedure, and what limitations can be placed on the residents in balancing the interests involved. This question is sure to arise again, and this case presents the perfect opportunity in which to answer the question. Given the inevitable increased use of the procedure of securing a residence while waiting for a war-

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[2] While the Illinois Appellate Court also found that the officer's conduct in standing in the doorway when he allowed Respondent to make a telephone call unreasonable, it is Petitioner's position that, if the securing of Respondent's residence was valid, allowing him to enter was merely a gratuitous act, and his accepting the limitations placed thereon was tantamount to a consensual situation. In addition, no evidence was seized as a result.

rant, and the possible increased use of telephone warrants,[3] this is a valid procedure whose limitations and perimeters must be established. Indeed, this type of action is being approved as an alternative to searches based on exigent circumstances. See *United States v. Veillette*, 778 F.2d 899 (1st Cir. 1985), where the court found that "even when an exigency is found, the least restrictive intrusion must be employed, or the whole constitutional requirement of obtaining a warrant would be defeated. When it is known that no one is presently on the premises, the property may be secured by merely guarding the entrances." *Veillette*, 778 F.2d at 902, n. 2. *Segura* leaves several unanswered questions;[4] most importantly, the extent to which a possessory interest in the secured premises can be interfered with must be decided.

Aside from the important constitutional question involved, and the fact that these impoundment procedures are bound to be utilized more frequently, this

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[3] Rule 41(c)(2), Federal Rules of Criminal Procedure authorizes a warrant being issued over the telephone if certain conditions are met, as do several state statutes. This would limit the time a residence must be secured until a warrant could issue, making the practice much more attractive. See also *United States v. Alexander*, et al., 923 F.Supp. 617, 624 (U.S.D.C.Vt. 1996) (Procedures are in place within this district to insure the availability of judicial officers for telephone warrants, and the Court recommends that such procedures be utilized in the future.)

[4] One of those unanswered questions, whether a search pursuant to a warrant was tainted by what the police had seen during an initial unlawful entry, was resolved in *Murray v. United States*, 487 U.S. 533, 533, 101 L.Ed.2d 472, 108 S.Ct. 2529 (1988). See also *People v. Griffin*, 727 P.2d 55, 59 (Colo. 1986) ("*Segura*, leaves some unanswered questions. . .")

Court should take this case because the cases that have determined the issue have not undertaken a comprehensive Fourth Amendment analysis in determining the extent that possessory interests can be interfered with, and have basically, and rightly, assumed that *Segura* allows some possessory interference. See *United States v. Crespo de Llano*, 838 F.2d 1006 (9th Cir. 1987). In *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997), the court relied on this Court's opinion in *Segura* to find that the entry of a hotel room based on probable cause in order to wait for the warrant to issue was in accord with the Fourth Amendment. The officers announced themselves and allowed the suspect to use the room's lavatory facilities. The court found that "Roby's own movement was unencumbered," "the officers entered, but took no investigative steps; they merely preserved the space and checked to assure their own safety." *Roby*, 122 F.3d at 1125. In *Ferdin v. Superior Court*, 36 Cal. App. 3d 774, 112 Cal. Rpt. 66 (1974), where a person arrested for possession of heroin admitted to being a courier for the defendant, police entered defendant's residence and kept him and his parents under close observation for over two hours while a search warrant was acquired. After noting that there had not been grounds to obtain a search warrant until after the courier was intercepted and that as of that moment there was a risk that defendant would be alerted when the courier failed to complete the errand, the court held that these facts established a sufficient risk of destruction of the contraband to "justify the actions, less than search, of entry and monitoring the occupants."

In *Crespo*, the defendant contended that she was illegally "seized or arrested" in violation of the Fourth Amendment when she was asked to remain outside

after her house was secured by officers until they obtained a search warrant. The court found that:

> First, the fact that officers secure a dwelling until they obtain a search warrant, where probable cause exists to conduct a search, in order to prevent the destruction or removal of evidence, is not an unreasonable seizure of the dwelling or its contents. *Segura v. United States*, 468 U.S. 796, 810, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984). . . . Under *Segura*, securing of the [ ] residence was not an unreasonable seizure because probable cause existed that cocaine was present on the premises. *Id.*

The court went on that:

> Second, a person is not 'seized' within the meaning of the fourth amendment unless, in view of all the circumstances surrounding the encounter with law enforcement officers, a reasonable person would have believed that he or she was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980). There is nothing on this record to show that [defendant] was subject to threats or a show of force. . . . The evidence shows that the DEA agents informed [defendant] that she was not under arrest when they asked her to remain outside her house and that she voluntarily consented to wait in the police car until the warrant was delivered. The district court correctly determined that no fourth amendment violation occurred.

Crespo, 838 F.2d at 1016.

This Court has determined that the securing of premises from the outside is constitutionally permissible while the police await a warrant based on probable

cause. This procedure is being utilized and is bound to be utilized more frequently in the future. This Court should delineate the extent to which a possessory interest might be interfered with, and to what extent and how long. This case presents the perfect opportunity to address the issue. If the Illinois Appellate Court case here is allowed to stand, it would render the securing of residences virtually impossible to uphold, unless all of the persons possessing a possessory interest therein were under arrest or in police custody in some manner. This would severely limit the holding of *Segura*.

CONCLUSION

For the aforementioned reasons, Petitioner, the State of Illinois, respectfully requests that this Honorable Court grant *Certiorari*, reverse the decision of the Illinois Appellate Court, Fourth District, and remand for further proceedings.

Respectfully submitted,

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APPENDIX

App. 1

[Dated May 7, 1999]

No. 5-97-0695

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

CHARLES McARTHUR,

Defendant-Appellee.

Appeal from the Circuit Court of Moultrie County,
No. 97CM44,
Honorable Arthur F. Powers, Jr., Judge Presiding.

JUSTICE COOK delivered the opinion of the court:

In May 1997, defendant Charles McArthur was charged by information with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of a substance containing less than 2.5 grams of cannabis. 720 ILCS 600/3.5(a); 550/4(a) (West 1996). Defendant filed a motion to suppress the evidence (a cannabis smoking pipe, a "one-hitter" box, and cannabis) found at his residence during the execution of a valid search warrant, arguing that his fourth amendment rights were violated because the police secured his residence and prevented him from reenter-

ing his residence alone during the two hours it took to obtain the search warrant. The trial court granted defendant's motion to suppress. The State appeals pursuant to Supreme Court Rule 604(a) (1). 145 Ill. 2d R. 604(a) (1). We affirm.

At the August 1997 hearing on defendant's motion to suppress, John Love, Sullivan assistant chief of police, testified that on the afternoon of April 2, 1997, at the request of defendant's wife, Tera McArthur, he and Officer Skidis accompanied her to a trailer where she and defendant resided, while she removed her property from the residence. After she finished removing her belongings, Tera told Love, who was standing on the porch, that defendant had "pot" in the trailer under the couch. Love knocked on the door and, when defendant answered, Love told him Tera said he had drugs in the trailer. Defendant denied he had drugs in the trailer. Defendant also denied Love's request to search the trailer for the drugs without a warrant. At that point, defendant was standing outside the trailer; however, Love did not recall whether he told defendant to come out of the trailer or if defendant came out on his own.

Upon Love's request, Tera told Love she would testify before a judge about what she had seen in the trailer. As a result, Love sent her with Officer Skidis to secure a search warrant for the residence. Love went back to the porch and told defendant what was happening. From that point, Love did not allow defendant to reenter the trailer unless accompanied by police so that defendant could not destroy or dispose of the evidence. Love allowed defendant to enter the residence on two or three occasions to get cigarettes and make telephone

calls, during which times Love stepped "right inside the door and just stood by the doorway the entire time."

According to the trial court, the search warrant was issued at 5:05 p.m. When police returned with the warrant, they entered the trailer, found cannabis and drug paraphernalia and placed defendant under arrest. Love testified that, before this point, no officer had told defendant he was under arrest, placed him in handcuffs, or told him he was not free to leave. Love testified no search of defendant's residence took place prior to the arrival of the search warrant.

Defendant testified his wife arrived with police officers at approximately 3:15 p.m. While Tera removed her belongings the police remained on the porch and did not enter the trailer. After Tera finished, Love came to the door and told defendant about Tera's claim that there was marijuana inside the residence and that Love asked to search the trailer. Defendant told Love he could not search without a warrant. Defendant testified he was outside the trailer when he heard Love and Tera talking about obtaining a search warrant and that Tera agreed to leave to testify, and that he stayed outside the trailer on the porch until the warrant came. Love did allow defendant to enter the trailer to retrieve cigarettes and to make telephone calls. Love was present but did not search the trailer at those times. Love told defendant that he could not wait inside the trailer by himself, but had to be accompanied by an officer, until police arrived with the warrant. Defendant testified that had he been allowed to go back into his residence alone he "would have destroyed the marijuana."

Defendant estimated it took police one to two hours to return with the search warrant. When they returned with the warrant, he entered the trailer and showed them where the drugs were located. After police found the drugs, they arrested him, searched and handcuffed him, and advised him of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). While waiting for the search warrant, police never told defendant he was not free to leave.

The issue before us is whether the securing of a dwelling by police for approximately two hours while awaiting a search warrant, and not allowing the resident defendant into the dwelling unless accompanied by an officer to prevent the removal or destruction of evidence inside the dwelling, violates defendant's fourth amendment rights against unreasonable searches and seizures. Defendant does not contest the validity of the search warrant or that probable cause existed to secure the residence. A trial court's decision whether to suppress evidence will not be disturbed on review unless manifestly erroneous. *People v. Alvarado*, 268 Ill. App. 3d 459, 463, 644 N.E.2d 783, 786 (1994). However, "'where neither the facts nor credibility of the witnesses is contested, the issue * * * is a legal question which a reviewing court may consider *de novo*.'" *Alvarado*, 268 Ill. App. 3d at 463, 644 N.E.2d at 787, quoting *In re D.G.*, 144 Ill. 2d 404, 408-09, 581 N.E.2d 648, 649 (1991). We review this matter as a question of law to determine whether defendant's fourth amendment rights were violated.

A seizure affects an individual's possessory interests while a search affects his privacy interests. *Segura v.*

United States, 468 U.S. 796, 806, 82 L. Ed. 2d 599, 609, 104 S. Ct. 3380, 3386 (1984) (opinion of Burger, C.J., joined by O'Connor, J.). A "seizure" occurs when a meaningful interference with an individual's possessory interests occurs. *Segura*. 468 U.S. at 822, 82 L. Ed. 2d at 620. 104 S. Ct. at 3394 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.). The fourth amendment, by its terms, prohibits only "unreasonable" searches and seizures. U.S. Const., amend. IV; *Segura*, 468 U.S. at 806, 82 L. Ed. 2d at 609, 104 S. Ct. at 3386 (opinion of Burger, C.J., joined by O'Connor, J.). A seizure based upon probable cause that is reasonable when it commences may become unreasonable as a result of its duration or other circumstances. *Segura*, 468 U.S. at 812, 82 L. Ed. 2d at 613, 104 S. Ct. at 3389 (opinion of Burger, C.J., joined by O'Connor, J.).

The State argues that, in *Segura*, the Supreme Court held that the fourth amendment permits admission of evidence found in a dwelling during execution of a valid search warrant when the police secured the dwelling from the inside for 19 hours while awaiting issuance of the search warrant. The State contends that *Segura* supports a finding that the fourth amendment permits admission of the evidence seized in this case.

In *Segura*, police arrested petitioner in the lobby of his apartment building, took him to his apartment, entered the apartment, and arrested everyone present. *Segura*, 468 U.S. at 800-01, 82 L. Ed. 2d at 605-06, 104 S. Ct. at 3383 (opinion of Burger, C.J., joined by White, Powell, Rehnquist, and O'Connor, JJ.). Two officers remained inside the apartment for 19 hours after the initial entry until the search warrant was issued and executed, while the petitioners remained under arrest

and in custody at police headquarters. *Segura*, 468 U.S. at 801, 82 L. Ed. 2d at 606, 104 S. Ct. at 3383 (opinion of Burger, C.J., joined by White, Powell, Rehnquist, and O'Connor, JJ.). In a 5 to 4 decision affirming the admission of the evidence seized pursuant to the warrant, the Court held in part IV (and also restated in part I) that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents" under the fourth amendment. *Segura*, 468 U.S. at 810, 82 L. Ed. 2d at 612, 104 S. Ct. at 3388 (opinion of Burger, C.J., joined by O'Connor, J.).

The authority of the *Segura* decision has been questioned. See J. Dressler, *A Lesson in Incaution, Overwork, and Fatigue: The Judicial Miscraftsmanship of Segura v. United States*, 26 Win. & Mary L. Rev. 375 (1985) (hereinafter Dressler). First, only two justices joined in part IV of the opinion, and so part IV is not part of the opinion of the Court. *Segura*, 468 U.S. at 797, 82 L. Ed. 2d at 600, 104 S. Ct. at 3380. Consequently, neither part IV, nor part I, which incorporates the holding stated in part IV, is binding precedent upon lower courts. *People v. Casazza*, 144 Ill. 2d 414, 419-20, 581 N.E.2d 651, 654-55 (1991); see Dressler at 416 ("[p]art IV is, in fact, a concurring opinion by two justices, and can be deleted without affecting the opinion"). Second, the Court (in part IV) never determined whether police effect a seizure of the premises and its contents within the meaning of the fourth amendment when they secure a dwelling. The justices assumed such action constituted a seizure of the residence and its contents, but in that case concluded that the seizure was not unreasonable under the circumstances. *Segura*,

468 U.S. at 806, 82 L. Ed. 2d at 609, 104 S. Ct. at 3386 (opinion of Burger, C.J., joined by O'Connor, J.). Nor did the Court express a view regarding whether securing a dwelling may "legitimately extend to limiting the freedom of movement of persons within, into or out of the impounded premises" (3 W. LaFave, Search & Seizure §6.5(c), at 366 (3d ed. 1996) (hereinafter LaFave)) or if such action constitutes a seizure or illegal arrest of the defendant resident. The Court did, however, seem to limit its holding (part IV) to the specific facts before it. During the time the police secured the dwelling from the inside, the petitioners were under arrest and in police custody. As a result:

> "The actual interference with their possessory interests in the apartment and its contents was, thus, virtually nonexistent. [Citation.] We are not prepared to say *under these limited circumstances* that the seizure was unreasonable under the Fourth Amendment." (Emphasis added.) *Segura*, 468 U.S. at 813, 82 L. Ed. 2d at 614, 104 S. Ct. at 3390 (opinion of Burger, C.J., joined by O'Connor, J.).

Both the *Segura* majority and the dissent implied that securing a residence from the outside when probable cause exists may not violate the fourth amendment's prohibition against unreasonable seizures. Part IV of the opinion notes that the police in that case would arguably have been wiser to "secure the premises from the outside by a 'stakeout'" and that entry into a residence is illegal absent exigent circumstances even when police have probable cause and are awaiting a search warrant. *Segura*, 468 U.S. at 811-12, 82 L. Ed. 2d at 613, 104 S. Ct. at 3388-89 (opinion of Burger, C.J., joined by O'Connor, J.). The dissent acknowledged:

> "Since these premises were impounded 'from the inside,' I assume impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter." *Segura*, 468 U.S. at 824 n.15, 82 L. Ed. 2d at 621 n.15, 104 S. Ct. at 3396 n.15 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

See also LaFave §6.5(c), at 366 ("[a]ll members of the Court appear to agree that the mere seizure of the premises and contents (that is, a mere interference with possessory interests) is permissible on probable cause even absent exigent circumstances").

Several conclusions may be derived from *Segura*. First, the Court did not address whether police, when securing a residence, may limit the "freedom of movement of persons within, into or out of" the secured premises (LaFave §6.5(c), at 366). The Court seemed to agree that the seizure of a residence and its contents is permissible absent exigent circumstances if there is probable cause, but that entry into the residence when securing it requires probable cause and exigent circumstances. LaFave §6.5(c), at 366-67. Whatever may be gleaned from the *Segura* decision, it did not address how to handle those cases where "police enter and incident to the entry either keep persons entitled to be in the premises under close scrutiny or else require such persons to leave or not enter those premises." LaFave §6.5(c), at 365.

Some courts have upheld the securing of a residence by police until a search warrant for the residence is issued. See, *e.g.*, *United States v. Crespo de Llano*, 838

F.2d 1006, 1011, 1016 (9th Cir. 1987); *Commonwealth v. Yesilciman*, 406 Mass. 736, 743, 550 N.E.2d 378, 383 (1990); see also LaFave §6.5(c), at 362 ("[s]ome courts have assumed, for example, that it is permissible for the police to place a guard outside of premises and to bar entry during the period in which a search warrant is being sought or, if persons are allowed to enter, to prohibit them from taking items from the premises"). However, cases where courts have found it permissible for police to secure a residence from the outside and to bar persons from entering the residence while awaiting a search warrant:

> "typically involved situations in which the only person or persons who could have claimed a lawful right to entry were already in custody or were subject to arrest if they appeared, or in which the person who did appear consented to remain outside." LaFave §6.5(c), at 362-63.

In *Casazza*, 144 Ill. 2d 414, 581 N.E.2d 651, the Supreme Court of Illinois concluded police had no authority to order persons off a yacht while police awaited a search warrant. *Casazza*, 144 Ill. 2d at 424, 581 N.E.2d at 656. Police went to defendants' yacht and informed the occupants that they either "could" or "would" obtain a search warrant and that people on board would have to leave while the police waited for the search warrant. *Casazza*, 144 Ill.2d at 415-16, 581 N.E.2d at 652-53. After police asked one of the defendants if they could search the yacht, the defendant asked what would happen if he did not consent to a search. Police repeated they could obtain a search warrant and require those on board to leave while they waited for the warrant. The defendant then consented

to a search of the yacht. *Casazza*, 144 Ill. 2d at 416, 581 N.E.2d at 653. In affirming defendants' motion to suppress the evidence discovered during the warrantless search of the yacht, the supreme court concluded the "police's illegal representation that they had authority to seize the yacht [ ], the trial court correctly found, vitiated the voluntariness of [defendant's] consent to the search." *Casazza*, 144 Ill. 2d at 424, 581 N.E.2d at 656. The court also concluded that *Segura* provided no authority for defending the police conduct in that case. *Casazza*, 144 Ill. 2d at 420, 581 N.E.2d at 655. Similarly in *People v. Dale*, 301 Ill. App. 3d 593, 703 N.E.2d 927 (1998), the police lacked the authority to order the defendant to leave his possessions in the motel room, after evicting him from the room, when the police had the lock changed and one officer waited in the lobby while others secured a search warrant. *Dale*, 301 Ill. App. at 601, 703 N.E.2d at 933. *Dale* explained that the Casazza court concluded police lacked the authority (because *Segura* did not support it) to seize premises while awaiting a search warrant. *Dale*, 301 Ill. App. at 601-02, 703 N.E.2d at 933.

In *People v. Wahlen*, 111 Ill. App. 3d 194, 195-97, 443 N.E.2d 728, 729-30 (1982), police arrived with defendant at his dorm room between 4 and 4:30 on a Sunday morning and advised him and his roommate that either the residents could consent to a search of the dorm room or it would be sealed off until a search warrant could be obtained, at least 24 hours later. Both residents gave their consent to search the room. *Wahlen*, 111 Ill. App. 3d at 196, 443 N.E.2d at 729. In affirming the trial court's grant of defendant's motion to suppress evidence found in the room because the residents' consent was coerced, this court explained: "We know of no authority in the police to 'seal' a room until a warrant may be obtained (if it may be obtained at all), and the time element here is not insignificant." *Wahlen*, 111 Ill. App. 3d at 197, 443 N.E.2d at 730.

At the heart of this issue is the preservation of evidence. Clearly, if police secure a dwelling they prohibit the destruction of the sought-after evidence. On the other hand, if police do not secure a dwelling, they risk losing the evidence, and as defendant testified at the hearing, if police had not secured his dwelling, he would have destroyed or disposed of the drugs and paraphernalia. Another option the police in this situation had was to bypass obtaining a search warrant and make a warrantless entry into defendant's residence to retrieve the evidence, although the potential that evidence will be destroyed, alone, is insufficient to justify a warrantless entry of a home. *People v. Eden*, 246 Ill. App. 3d 277, 287, 615 N.E.2d 1224, 1230 (1993); *cf. People v. Krueger*, 175 Ill. 2d 60, 67, 675 N.E.2d 604, 608 (1996) (exigent circumstances, including the ease with which evidence may be destroyed, excuse an officer's compliance with the knock-and-announce rule preceding an arrest or a search). Instead of searching the residence without a warrant, police in this case opted to wait for a judge's determination whether to issue a search warrant for defendant's residence.

This case does not fall within any of the three situations when courts have found it permissible for police to secure a residence from the outside while seeking a search warrant. See LaFave §6.5(c), at 362-63. Nor is the police conduct in this case exactly like *Casazza* or *Dale* because there is no evidence the police affirma-

tively ordered defendant out of the trailer (and to leave his belongings) while awaiting the search warrant. This case represents a situation that *Segura* did not address. See LaFave §6.5(c), at 365.

We find that there was no authority for the police action in this case. Defendant was inside his residence when the police came to his door and he refused to let them search without a search warrant. While the police were still on the premises defendant moved from the inside of his trailer out onto the front porch when police told him he had to remain outside the trailer or that he could go inside only if accompanied by an officer. Though not inside his residence, defendant was still on his premises when police refused to let him reenter the trailer unaccompanied. Even though police had probable cause to secure the residence (defendant does not dispute this), the police conduct amounted to a constructive eviction of defendant from his residence. This case is different from a situation in which the defendant resident is not on the premises when police arrive to secure the residence from the outside while seeking a search warrant; that is, where police, with probable cause, secure a residence and do not permit anyone arriving at the premises (from the outside) entrance into the residence.

Furthermore, the police also secured the dwelling from the inside when Love followed defendant into the trailer, and Love physically entered the trailer to observe defendant and ensure defendant did not destroy the evidence. Unlike *Segura*, where police entered the dwelling when the defendants were arrested and in custody, defendant here was not arrested and Love's entrance into the trailer amounted to both a meaning-

ful interference with defendant's possessory interests (a seizure) and his privacy interests (a search). See *Segura*, 468 U.S. at 806, 82 L. Ed. 2d at 609, 104 S. Ct. at 3386 (opinion of Burger, C.J., joined by O'Connor, J.); see also LaFave §6.5(c), at 366. Police entry into a residence absent exigent circumstances (even with probable cause) is illegal (*Segura*, 468 U.S. at 811-12, 82 L. Ed. 2d at 613, 104 S. Ct. at 3388-89 (opinion of Burger, C.J., joined by O'Connor, J.,)) and no exigent circumstances here justified Love's entry into the trailer. See *Eden*, 246 Ill. App. 3d at 287, 615 N.E.2d at 1230. We conclude the police conduct in securing defendant's residence while awaiting the search warrant was an unreasonable seizure (and probably an unreasonable search) under the fourth amendment so that the evidence discovered in the residence upon execution of the search warrant was properly suppressed.

A person is "seized" within the meaning of the fourth amendment only when, considering all the circumstances surrounding the encounter with the police, a reasonable person would have believed he was not free to leave. *Crespo de Llano*, 838 F.2d at 1016. Whether the defendant was subjected to threats or a show of force by police is also a relevant consideration. *Crespo de Llano*, 838 F.2d at 1016. A defendant's subjective belief that he is under arrest is irrelevant in determining whether an arrest has occurred, but the police's intent and whether the defendant has been told that he is under arrest are appropriate considerations. *People v. Maltbia*, 273 Ill. App. 3d 622, 628, 653 N.E.2d 402, 406-07 (1995).

It is unclear whether the police effected a seizure of defendant's person when they secured his residence

and, if so, whether the seizure was unreasonable. No evidence in the record indicates the police threatened defendant or made a physical show of force toward him. Prior to the police placing defendant under arrest after conducting the search pursuant to the warrant, no officer ever placed him in handcuffs, told him he was under arrest, or told him he was not free to leave. It appears that during the time police secured his residence defendant was free to go anywhere in the world except back into his trailer by himself. (However, despite the testimony, it is questionable whether police would have allowed defendant to leave the premises and whether defendant actually felt free to leave under the circumstances). The securing of defendant's residence under these circumstances may have included an unreasonable seizure of defendant's person as well. But see LaFave §6.5(c), at 366 ("to the extent that a stakeout effects a sort of seizure of the person of an individual who is thereby thwarted from gaining entry to the premises, it is again not remarkable that this may be done without either a warrant or exigent circumstances, for neither is necessary for a more substantial interference with a person—arrest—occurring off private premises").

We affirm the order of the trial court granting defendant's motion to suppress evidence.

Affirmed.

STEIGMANN and MYERSCOUGH, JJ., concur.

87677

CLERK OF THE COURT
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October 6, 1999

Mr. Charles F. Mansfield
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No. 87677 – People State of Illinois, petitioner, v. Charles McArthur, respondent. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1999.

Supreme Court, U.S.
FILED
MAR 27 2000
CLERK

(2)

No. 99-1132

In The
Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **i, ii, iii**

REASONS FOR DENYING THE WRIT **1**

CONCLUSION **9**

TABLE OF AUTHORITIES

United States Supreme Court Cases: ***Page(s)***

Mincey v. Arizona,
437 U.S. 385, 98 S. Ct. 2408,
57 L.Ed.2d 290 (1978) 8

Payton v. New York,
445 U.S. 573, 100 S. Ct. 1371,
63 L.Ed 2d, 639, (1980) 3

Segura v. United States,
468 U.S. 796, 104 S.Ct. 3380,
82 L.Ed.2d 599 (1984) 1, 2, 3, 4, 5, 8

Steagald v. United States,
451 U.S. 204, 221, 101 S. Ct. 1642,
1652, 68 L.Ed.2d 38, 51 (1981) 6

Terry v. Ohio,
392 U.S. 1, 88 S.Ct. 1868,
20 L.Ed.2d 889 (1968) 1, 2

United States v. Santana,
427 U.S. 38, 42-43, 96 S. Ct. 2406,
2409-10, 49 L.Ed.2d 300, 305 (1976); 6

Other Cases:

People v. Casazza
144 Ill. 2d 414, 581 N.E.2d 651 (1991) 5, 6

People v. Dale,
301 Ill. App. 3d 593, 703 N.E.2d
927 (4th Dist. 1998) 6

People v. Foskey
136 Ill. 2d 66, 75, 554 N.E.2d
192, 197 (1990) 7

People v. Jones
274 N.W.2d 273, 275-76 (Iowa 1979), *cert. denied*,
446 U.S. 907, 100 S. Ct. 1833,
64 L.Ed.2d 259 (1980) 7

People v. McArthur,
304 Ill. App. 3d 395, 713 N.E.2d 93
(4th Dist. 1999) 1, 2, 3, 4, 5, 6, 7, 8

People v. Wahlen,
111 Ill. App. 3d 194, 443 N.E.2d
728 (4th Dist. 1992) 6

People v. Yates,
98 Ill. 2d 502 (1983) 6

United States v. Segura,
663 F.2d 411 (1981); *3*

United States v. Acevedo,
627 F.2d 68, 70 (7th Cir.), *cert. denied*,
449 U.S. 1021, 101 S. Ct. 587, 66
L.Ed.2d 482 (1980) 7

Additional Authority:

720 ILCS 600/3.5 (West 1998) 7

REASONS FOR DENYING THE WRIT

The decision by the Illinois Appellate Court in *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999) does not merit review by this Court. Despite the State's assertion, the *McArthur* court did not decide that police are prohibited from securing a residence from the outside and barring entry into that residence while a search warrant is being obtained contrary to this Court's decision in *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380, 82 L.Ed.2d 599 (1984). Rather, the crux of the *McArthur* decision was that the police illegally seized Mr. McArthur's residence by constructively evicting him, and conducted an illegal search by refusing his requests to reenter his home without a police officer's immediate presence. *McArthur*, 304 Ill. App. 3d at 402, 713 N.E.2d at 98. This decision was entirely consistent with the balancing test long established by this Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny and in keeping with this Court's reasoning in *Segura*.

Mr. McArthur stepped outside of his residence to refuse the police officer's request to search his home and from that point was barred from reentering without being accompanied by a police officer until another officer returned

with a search warrant. (R. 7-8, 12, 17-19). The police refused to let Mr. McArthur's mother enter his home without a police officer present. (R. 7-8). Anytime Mr. McArthur went into his home, a police officer stepped inside with him. (R. 8). These are the facts that the Illinois Appellate Court found compelling and distinguishable from *Segura*.

The criteria that this Court generally applies in granting a petition for certiorari are not present in the *McArthur* case. The *McArthur* decision is not an opinion from the highest court in the State of Illinois in conflict with the decision of the courts of last resort in other states, or with precedent established by the federal court of appeals. Further, the *McArthur* opinion does not conflict with applicable decisions of this Court, nor did it decide an important question that should be settled by this Court. Rather, the *McArthur* decision appropriately applied the balancing test long established by this Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny, and correctly determined that the police's conduct under these circumstances was unreasonable. As this Court has observed, in terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm

line at the entrance to the home. *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382, 63 L.Ed 2d 639, 653 (1980).

Without ever discussing the facts of *Segura*, the State contends that the *McArthur* court wrongly interpreted *Segura*. In *Segura*, the police arrested the petitioner in the lobby of his apartment building. They accompanied Segura to his apartment where they entered finding four others, including another individual for whom the police had an arrest warrant. The officers conducted a limited security check of the apartment to ensure that no one who was there posed a threat to their safety, or could destroy evidence. While performing this check, the officers observed drug paraphernalia in plain view. Two officers remained in Segura's apartment for 19 hours until a search warrant was issued while Segura and the others were taken into custody at police headquarters. The search yielded drugs, ammunition, cash and records of narcotics transactions. The district court granted the petitioners motion to suppress; however, that decision was reversed by the Second Circuit Court of Appeals, *United States v. Segura*, 663 F.2d 411 (1981). The petitioners were subsequently convicted of various drug

offenses, the Court of Appeals affirmed, and this Court granted certiorari. This Court determined that securing the premises from within while awaiting a search warrant, and while the owners were in police custody, was not unreasonable under the totality of the circumstances. *Segura*, 468 U.S. at 798, 104 S. Ct. at 3386, 82 L.Ed.2d at 604. The *Segura* decision did not determine whether a seizure of the premises occurred because it was not necessary to the Court's opinion. Rather, this Court said under the totality of the circumstances, any seizure that might have occurred was reasonable. *Segura*, at 806, 104 S. Ct. at 3386, 82 L.Ed.2d at 609. The *Segura* Court further reaffirmed precedent that an entry into the home in the absence of exigent circumstances is illegal. *Segura*, at 811-12, 104 S. Ct. at 3388, 82 L.Ed.2d at 613.

This is not a case, as the State suggests, where the police merely secured the residence from the outside. In *McArthur*, the police not only prohibited Mr. McArthur from reentering his home when he stepped outside to talk to them, but also admittedly entered Mr. McArthur's residence despite his telling them that they could not come into his home without a warrant. The Illinois Appellate Court correctly distinguished

Segura and concluded that the police had no authority to secure McArthur's home from the inside when he was not under arrest, or to prevent his reentry unless accompanied by a police officer given that the police were told that they could not enter. Mr. McArthur's case did not present circumstances like *Segura* where the officers entered Segura's apartment following his valid arrest and sealed the premises while its occupants were in police custody. Rather, the officer in McArthur's case had no authority to enter his home and did so despite being denied permission to search.

In reaching its conclusion, the Illinois Appellate Court relied on precedent from within the State. At the root of the Illinois cases discussed by the *McArthur* court was the Illinois Supreme Court's decision in *People v. Casazza*, 144 Ill. 2d 414, 581 N.E.2d 651 (1991). The *Casazza* court held that the police had no authority to order persons off a yacht while they waited for a search warrant. The State argued that *Segura* held that the securing of a dwelling when probable cause exists is not unreasonable when done to prevent the destruction of evidence. The *Casazza* court rejected this argument noting that the State relied on section IV of *Segura*, which was not binding precedent due to the fact that only

one justice joined in this section of the opinion. *Casazza*, 144 Ill. 2d at 419, 581 N.E.2d at 654. The *McArthur* court also relied on numerous decisions of the Illinois Appellate Court holding that the police do not have the absolute authority to seize and seal residences while waiting for search warrants. See *People v. Dale*, 301 Ill. App. 3d 593, 703 N.E.2d 927 (4th Dist. 1998); *People v. Wahlen*, 111 Ill. App. 3d 194, 443 N.E.2d 728 (4th Dist. 1992).

Furthermore, the Illinois Appellate Court found that no exigent circumstances existed for the officer's warrantless entry into Mr. McArthur's home. *McArthur*, 304 Ill. App. 3d at 403, 713 N.E.2d at 98. Whether exigent circumstances exist is evaluated on a case-by-case basis. *People v. Yates*, 98 Ill. 2d 502 (1983) (citing *Steagald v. United States*, 451 U.S. 204, 221, 101 S. Ct. 1642, 1652, 68 L.Ed.2d 38, 51 (1981) and *United States v. Santana*, 427 U.S. 38, 42-43, 96 S. Ct. 2406, 2409-10, 49 L.Ed.2d 300, 305 (1976)). Among the factors that are considered in judging the exigency of a particular situation are whether: (1) a grave offense is involved, particularly a crime of violence; (2) the suspect is reasonably believed to be armed; (3) there exists a clear showing of probable cause; (4) there is strong reason to

believe that the suspect is in the premises; (5) there is a likelihood the suspect will escape if not swiftly apprehended; and (6) the police entry, though nonconsensual, is made peaceably. *People v. Foskey*, 136 Ill. 2d 66, 75, 554 N.E.2d 192, 197 (1990); see also *People v. Jones*, 274 N.W.2d 273, 275-76 (Iowa 1979), *cert. denied*, 446 U.S. 907, 100 S. Ct. 1833, 64 L.Ed.2d 259 (1980); *United States v. Acevedo*, 627 F.2d 68, 70 (7th Cir.), *cert. denied*, 449 U.S. 1021, 101 S. Ct. 587, 66 L.Ed.2d 482 (1980).

Here, the Illinois Appellate Court properly found that no exigent circumstances existed for the officer's entry into Mr. McArthur's home. The offense that Mr. McArthur was charged with, possession of small amount of cannabis, was a Class A misdemeanor. 720 ILCS 600/3.5 (West 1998). There were no facts indicating that Mr. McArthur was armed or that he would escape. Although probable cause existed and the police entry was made peaceably, the trial court certainly did not abuse its discretion in finding that the officers' conduct in Mr. McArthur's case was unreasonable and the Illinois Appellate Court correctly affirmed that decision.

The police essentially sealed Mr. McArthur's home and made a warrantless entry. The court correctly applied

the above precedents and affirmed the trial court's ruling. As this Court has held numerous times, whether a given search or seizure violates the Fourth Amendment depends on a balancing test to be applied by courts on a case-by-case basis. The trial court and Illinois Appellate Court applied such a balancing test in *McArthur* and determined that the State's interests did not warrant police action preventing Mr. McArthur from reentering his home or stepping inside Mr. McArthur's residence whenever he did, without consent.

Contrary to the State's assertion, the *McArthur* decision does not render the securing of residences in order to obtain evidence virtually impossible to uphold, nor does it severely limit the holding in *Segura*. Rather, the *McArthur* court's well reasoned analysis reaffirms this Court's pronouncements that "the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." See *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 2413, 57 L.Ed.2d 290, 300 (1978). The State must have a warrant to enter a private citizen's home

or exigent circumstances must exist for a warrantless entry. The Illinois Appellate Court correctly concluded that the trial court did not abuse its discretion in finding that neither one of those two circumstances existed in Mr. McArthur's case. Accordingly, this Court should deny the State's petition for a writ of certiorari.

CONCLUSION

For the reasons contained herein, the Respondent, Charles McArthur, respectfully requests that this Court deny the State's petition for a writ of certiorari.

Respectfully submitted,

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(9)

Supreme Court, U.S.
FILED
APR 5 2000
CLERK

No. 99-1132

In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

REPLY BRIEF FOR PETITIONER

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9 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases PAGE(S)

People v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999) 1, 3, 4

Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) 1, 2, 3, 4

Additional Authority

LaFave, SEARCH AND SEIZURE, 3rd ed., Vol. III, sec. 6.5(c) (1996) 5

ARGUMENT

Respondent suggests that the Illinois Appellate Court's decision in *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999) is not in direct conflict with *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), and did not decide that police are prohibited from securing a residence from the outside and barring entry into that residence while a search warrant is being obtained, relying on the *McArthur* language that the action in that case constituted a "constructive eviction." Respondent says that the crux of the *McArthur* decision was that the police illegally seized Mr. McArthur's residence by constructively evicting him, and conducted an illegal search by refusing his requests to re-enter his home without a police officer's immediate presence. However, the question presented here, despite the *McArthur* court's use of the term "constructive eviction" to describe the police action in securing Respondent's residence from the outside and disallowing Respondent to enter the residence, is whether a person can be denied access to his home where it is secured from the outside while a search warrant based on probable cause is being obtained. The *McArthur* court's answer to this question is in direct conflict with *Segura* and needs to be addressed by this Court as it is an important question that needs resolution.[1]

---

[1] Respondent does not dispute that the question presented by Petitioner is an important one or that *Segura* needs to be more defined. Nor does Respondent dispute that the cases which have addressed the question are in conflict with one another, providing another reason for review.

According to Respondent, this is not a case where the police merely secured the residence from the outside to await a warrant based on probable cause, and this case is different because the police not only prohibited Respondent from entering his home, but also entered his residence despite him telling them that they could not come into his home without a warrant. However, Respondent's distinction is irrelevant to the question presented here. The police told Respondent he could not re-enter his home without a police officer with him, since the home was secured from the outside. Without such a restriction the residence could never be considered "secure;" indeed, Respondent admitted that, had he been permitted to enter alone, he would have destroyed the evidence. The Illinois Appellate Court found that the officer's conduct in standing in the doorway while he allowed Respondent to make a telephone call was an "unreasonable search," and Respondent relies heavily on that conclusion in his brief in opposition. Respondent's (and the Appellate Court's) reliance on these limited entries is little more than a red herring; properly considered, the facts of this case present no legitimate legal issue regarding entry. No evidence was observed by the officer during the brief moments he stood in Respondent's doorway, and the outcome of the case would have been no different had the officer simply secured the trailer and refused Respondent any entry, something which, Petitioner contends, would have been entirely permissible under *Segura*. If the securing of Respondent's residence was valid, allowing him to enter was at most a gratuitous act. The police did not go into Respondent's residence and search after being told not to do so.

Respondent also suggests that this case does not conflict with applicable decisions of this Court nor did it decide an important question that should be settled by this Court, relying on the fact that the *McArthur* court relied on precedent from within the State, and also found that no exigent circumstances existed for the warrantless entry into McArthur's home. Whether or not exigent circumstances existed is totally irrelevant if the police action in securing the residence from the outside was allowable under *Segura*. If securing the residence was allowable, then the police searched pursuant to the warrant for which they were waiting. Precedent fr n within the State regarding the fact that police do not have the absolute authority to seize and seal residences while waiting for search warrants is also irrelevant. No one is suggesting absolute authority to seize and seal residences while awaiting a search warrant. Petitioner is suggesting that the *McArthur* opinion is wrong and is in direct conflict with *Segura* and that the extent to which one can secure a residence to await a search warrant based on probable cause, and exactly what possessory interests can be interfered with in pursuit of this under *Segura,* must be determined.

The Illinois Appellate Court's opinion in this case misconstrues and unjustifiably limits this Court's holding in *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), and conflicts with the federal and state courts that have considered whether one's possessory interests can be interfered with while police are awaiting a search warrant based on probable cause under *Segura*. Both the majority and the dissent in *Segura* agreed that securing a residence from the outside when probable cause exists may not violate the

Fourth Amendment's prohibition against unreasonable seizures. *Segura*, 468 U.S. at 811-12, 104 S.Ct. at 3388-89, 82 L.Ed.2d at 613 (opinion of Burger, C.J., joined by O'Connor, J.); 468 U.S. at 824 n. 15, 104 S.Ct. at 3396 n. 15, 82 L.Ed.2d at 621 n. 15 (Stevens, J. dissenting, joined by Brennan, Marshall, and Blackmun, JJ). All members of the *Segura* Court agreed that a purely external seizure of a residence and its contents based on probable cause is permitted by the Fourth Amendment. The right of exclusion necessarily flows from the right to seize a residence and its contents from the outside based on probable cause. That this concomitant right exists is clear from the statement that the evidence would have been discovered as if the police had established "a perimeter stakeout to prevent *anyone* from entering and destroying evidence." *Segura*, 104 S.Ct. at 3390 (emphasis added). An external impoundment would, by definition, include some type of possessory interference. This Court must more clearly define the extent that interference is reasonable, as courts, as shown here, are wrongly interpreting *Segura*.

Respondent asserts that Petitioner, without discussing the facts of *Segura*, merely contends that the *McArthur* court wrongly interpreted *Segura*. Respondent then gives a recitation of the facts of *Segura*, but does not suggest how the *McArthur* court correctly interpreted *Segura*. (Brief in Opposition to Petition for Writ of Certiorari, pp. 3-4). Respondent merely suggests that this case only involved whether there was a warrant or exigent circumstances. However, that does not explain the *McArthur* court's misconstruction of *Segura*. The *McArthur* court here found that *Segura* allowed a warrantless seizure and securing of a residence based on

probable cause while obtaining a warrant if one of three situations was present. Citing *LaFave*, the Illinois Appellate Court stated that *Segura* allows denial of access only when the only persons who could claim access: 1) are already in custody; 2) are subject to arrest when they appear; or 3) have consented to remain outside. *McArthur*, 713 N.E.2d at 98. However, the section of *LaFave* cited for this proposition merely was an overview of the cases that actually have addressed the issue, and those cases were limited to their specific facts. *LaFave* went on to say that "[the cases] thus do not unquestionably resolve the issue whether, for example in [citation] the police could have lawfully barred the defendant's mother and brother from entering their own home." *LaFave*, SEARCH AND SEIZURE, 3rd ed., Vol. III, sec. 6.5(c), 363 (1996). The fact that the question is not resolved is the reason that it must be decided by this Honorable Court. While *Segura* does not specifically address the question of the extent to which one's possessory interests can be interfered with to achieve that result, the Illinois Appellate Court's finding of a Fourth Amendment violation is wrong, and this Court must address this important question. This case presents the perfect opportunity for this Court to decide the question.

CONCLUSION

For the aforementioned reasons, Petitioner, the State of Illinois, respectfully requests that this Honorable Court grant *Certiorari*, reverse the decision of the Illinois Appellate Court, Fourth District, and remand for further proceedings.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-1132

In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 4, 2000
CERTIORARI GRANTED MAY 1, 2000

TABLE OF CONTENTS

PAGE

People v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999) ..... Pet. App. 1-14

People v. McArthur, No. 87677 (Supreme Court of Illinois, October 6, 1999) ..... Pet. App. 15

List of Relevant Docket Entries, *People v. McArthur*, No. 97 CM 44 (6th Judicial Circuit, Moultrie County, Illinois) ..... Jt. App. 1

Search Warrant, 97 MR 2 (6th Judicial Circuit, Moultrie County, Illinois) ..... Jt. App. 3

Complaint for Search Warrant, with Affidavits, 97 MR 2 (6th Judicial Circuit, Moultrie County, Illinois) ..... Jt. App. 5

Transcript of Evidentiary Hearing, *People v. McArthur*, No. 97 CM 44 (6th Judicial Circuit, Moultrie County, Illinois, August 25, 1997) ..... Jt. App. 11

LISTING OF RELEVANT DOCKET ENTRIES

People of the State of Illinois v. Charles McArthur

Date	Docket Entry
Circuit Court of the Sixth Judicial Circuit Moultrie County, Illinois	
April 2, 1997	Complaint for violation of Statute and Notice of Arrest Without Warrant; Defendant Charles McArthur appears and is released on bond; Bail Bond issued.
May 9, 1997	Criminal Information filed charging Defendant with knowing possession of drug paraphernalia.
May 12, 1997	Defendant appears; matter continued.
May 19, 1997	Entry of Appearance of counsel for Defendant.
May 28, 1997	Criminal Informations filed charging Defendant with additional count of knowing possession of drug paraphernalia and with knowing possession of not more than 2.5 grams of marijuana.
May 30, 1997	Defendant's waiver of trial by jury filed.
May 30, 1997	Defendant appears with counsel; plea of not guilty entered. Case set for hearing on Motion to Suppress Evidence and for trial.

June 17, 1997	Laboratory report regarding analysis of marijuana served and filed.
June 27, 1997	Defendant's Motion to Suppress Evidence filed.
August 25, 1997	Suppression hearing held; Motion to Suppress Evidence granted.
August 28, 1997	State's Certificate of Substantial Impairment and Notice of Appeal filed.

Illinois Appellate Court, Fourth District

May 7, 1999	Opinion of the Illinois Appellate Court, Fourth District, affirming the Circuit Court's order is issued. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E. 2d 93 (4th Dist. 1999).

Illinois Supreme Court

October 6, 1999	Order denying petition of the People of the State of Illinois for leave to appeal is issued.

SEARCH WARRANT

CIRCUIT CLERK

Moultrie County, Illinois
Sixth Judicial Circuit

THE PEOPLE OF THE STATE OF ILLINOIS
TO ALL PEACE OFFICERS OF THE STATE:

On this day Richard L. Skidis and Tera M. McArthur, Complainants, have subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search the following described premises:

> The residence of Charles S. McArthur, being a mobile home located at Lot #59 Gravens Trailer Park, Sullivan, Moultrie County, Illinois,

and seize the following instruments, articles and things:

> Cannabis, Cannabis packaging and Drug or Cannabis Paraphernalia,

which have been used in the commission of, or which constitute evidence of the offense of **Unlawful Possession of Cannabis** committed at or about Lot #59 Gravens Trailer Park in Sullivan, Moultrie County, Illinois, between April 1, 1997 and April 2, 1997.

I further command that a return of anything so seized shall be made without unnecessary delay before me or before any court of competent jurisdiction.

/s/ Dan L. Flannell
Judge of the Circuit Court
for the Sixth Judicial Circuit
of Illinois, Moultrie County,
Sullivan, Illinois.

Time and date of Issuance: 5:05 p.m. 4-2-97

IN THE CIRCUIT COURT
FOR THE SIXTH JUDICIAL CIRCUIT OF ILLINOIS
MOULTRIE COUNTY, SULLIVAN, ILLINOIS

COMPLAINT FOR SEARCH WARRANT

Now come Richard L. Skidis, a sworn Peace Officer, and Tera M. McArthur, Complainants herein, and petition this honorable Court issue a Search Warrant to search the following premises, namely:

> The residence of Charles S. McArthur, being the mobile home located at Lot #59, Gravens Trailer Park in the City of Sullivan

located in the County of Moultrie and State of Illinois, and seize the following instruments, articles and things, to-wit:

> Cannabis, Cannabis Packaging, Drug and/or Cannabis Paraphernalia,

which have been used in the commission of, or which constitute evidence of the offense of Unlawful Possession of Cannabis committed at Lot #59 Gravens Trailer Park, Sullivan, Moultrie County, Illinois.

Complainants say that they have probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the premises set forth above:

> (Please see affidavits of Richard L. Skidis and Tera M. McArthur, attached hereto and incorporated by reference.)

Dated this 2 day of April, 1997 at 5:00 p.m.

/s/ Tera McArthur
Complainant

/s/ Richard L. Skidis
Complainant

Subscribed and sworn to before me this 2 day of April, 1997.

/s/ Dan L. Flannell
Judge of the Circuit Court
for the Sixth Judicial Circuit
of Illinois, Moultrie
County, Sullivan, Illinois

STATE OF ILLINOIS)
) ss
COUNTY OF MOULTRIE)

EXHIBIT A

AFFIDAVIT

(In Support of Complaint for Search Warrant)

Comes now Richard L. Skidis, Affiant, and after being duly sworn upon oath deposes and states:

1. That he is a police officer for the City of Sullivan, Illinois and has been for eleven years.
2. That he is familiar with Charles S. McArthur and has been for approximately ten years.
3. That he knows that Charles S. McArthur has a reputation for possessing drugs and cannabis.
4. That he believes that Charles S. McArthur was a suspect in a previous narcotics investigation.
5. That on April 2, 1997 at approximately 3:40 P.M. he was at the residence of Charles McArthur at Lot #59 Gravens Trailer Park with Tera McArthur, the wife of Charles S. McArthur, for the purpose of keeping the peace while Tera M. McArthur retrieved her personal property pursuant to an Order of Protection issued from the Macon County Circuit Court.
6. That after Tera M. McArthur came out of the residence at Lot #59, she informed Officers Skidis and John Love that she had just observed cannabis in the living room of the residence.

7. That when questioned about the possession of cannabis in the residence by the Officers, Charles S. McArthur appeared nervous and evasive.

8. That he has known Tera M. McArthur for approximately ten years and believes her to be credible and reliable.

FURTHER AFFIANT SAYETH NOT:

/s/ Richard L. Skidis

Subscribed and sworn to before me this 2 day of April, 1997.

/s/ Dan L. Flannell
CIRCUIT JUDGE

STATE OF ILLINOIS)
) ss
COUNTY OF MOULTRIE)

EXHIBIT A

AFFIDAVIT

(In Support of Complaint for Search Warrant)

Comes now Tera M. McArthur, age 22, Affiant, and after being duly sworn upon oath deposes and states:

1. That she is the wife of Charles S. McArthur.

2. That on April 2, 1997 at about 3:40 P.M. she was in the residence of Charles S. McArthur at Lot #59 Gravens Trailer Park in Sullivan, Moultrie County, Illinois.

3. That she observed an amount of cannabis in the living room of that residence under the sofa.

4. That she observed Charles S. McArthur place the cannabis there.

5. That she has known Charles S. McArthur for approximately 18 months.

6. That she has seen him with cannabis and cannabis paraphernalia on numerous occasions.

7. That she knows what cannabis and cannabis paraphernalia look like.

8. That she has seen cannabis and cannabis paraphernalia on several occasions at that residence previously.

9. That Charles S. McArthur is known by her to regularly use cannabis.

FURTHER AFFIANT SAYETH NOT:

/s/ Tera McArthur

Subscribed and sworn to before me this 2 day of April, 1997.

/s/ Jackie D. Guin
NOTARY PUBLIC

IN THE CIRCUIT COURT
FOR THE SIXTH JUDICIAL CIRCUIT OF ILLINOIS
MOULTRIE COUNTY, SULLIVAN, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff, v. CHARLES MC ARTHUR, Defendant.	)	No. 97-CM-44

REPORT OF PROCEEDING AT HEARING.

BE IT REMEMBERED that the above-entitled cause came on for hearing on the 25th day of August, 1997, before the Honorable Arthur F. Powers, Jr., Associate Judge.

APPEARANCES:

Moultrie County State's Attorney
Tim J. Willis
Moultrie County Courthouse
Sullivan, Illinois 61951

Appeared on behalf of the People,

Mr. Jeffry A. Justice
CAMPBELL & ROBINSON
500 Millikin Court
Decatur, IL 62525

Appeared on behalf of the defendant.

Whereupon the following proceedings were had and entered of record in said cause:

SUSAN BURSA
CERTIFIED SHORTHAND REPORTER
MOULTRIE COUNTY COURTHOUSE
SULLIVAN, ILLINOIS 61951

INDEX

Witness	DIRECT	CROSS	REDIRECT
Asst. Police Chief John Love	[Jt. App. 14]	[Jt. App. 19]	[Jt. App. 23]
Charles McArthur	[Jt. App. 25]	[Jt. App. 28]	

EXHIBITS

Description	MARKED	ADMITTED
(None)		

THE COURT: 97-CM-44, People versus Charles McArthur. Mr. Willis present. Defendant present with Attorney Jeff Justice.

The first matter, I think, should be the Motion to Suppress, even though it's set for trial today.

MR. JUSTICE: We agree.

THE COURT: Okay. Hearing on defendant's Motion to Suppress. Mr. Justice.

MR. JUSTICE: Your Honor, we would call Officer Love.

THE COURT: I see four officers in the room. Are you going to call all four of them; or do you know?

MR. JUSTICE: Probably just Officer Love.

MR. WILLIS: For purposes of the suppression motion, that's probably true.

THE COURT: Okay.

ASSISTANT CHIEF OF POLICE JOHN LOVE, called as a witness on behalf of the Defendant, after being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION
BY MR. JUSTICE:

Q: Would you give us your name and occupation, sir?

A: My name is John Edward Love. I am employed by the City of Sullivan as Assistant Chief of Police for the Sullivan Police Department, Sullivan, Illinois.

Q: How long have you been a police officer?

A: In total, approximately 15 or 16 years.

Q: How long have you been Assistant Chief?

A: I'd say approximately three years.

Q: Do other officers call you Assistant Chief or Chief?

A: It varies.

Q: I never know what the appropriate title is with an assistant.

On April 2, 1997, did you go to Lot 59 in Graven's Trailer Court here in Moultrie County?

A: Yes, sir.

Q: And what was the purpose of going there on that date?

A: I was approached by Tera Hubbard McArthur, who I was familiar with; and she asked if we would accompany her to that trailer while she could mover her personal belongings out of that trailer.

Q: And her relationship to Charles McArthur?

A: It would be her husband.

Q: Okay. And did she go there and move her stuff out?

A: Yes, sir.

Q: And did she speak to you about anything unusual after moving her stuff out?

A: Yes, sir.

Q: And what did she tell you?

A: She advised me that I ought to check the trailer, that Chuck had dope in there.

Q: Those were her exact words?

A: As I recall, sir.

Q: And did you ask her anything further or did she say anything further?

A: Not at that point.

Q: What happened after the statement was made by her?

A: I went back and knocked on the front door of the trailer. I was actually out on the porch area when Ms. McArthur advised me of this. I went to the front door, knocked, and Mr. McArthur came and answered the door.

Q: And, that's the gentleman to my right?

A: Yes, sir.

Q: And what did he and you talk about?

A: I advised Mr. McArthur of the statement that his wife had just advised me that he had dope in the trailer.

Q: And what did he say in response?

A: That he had no dope in the trailer.

Q: Continue with the conversation, as you best recall it, please?

A: I asked, as I told Mr. McArthur his wife's statement to me in reference to the dope, I asked him if he would care if I looked in the trailer for the dope. And Mr. McArthur stated, no, not without a warrant.

Q: Continue.

A: So, at that point, Mr. McArthur was standing outside the trailer, down by the steps. And I went back and

asked her if she would testify in front of a judge as to what she saw in the trailer, which she had advised me of, to see about getting a search warrant for the trailer.

Q: And what did she say?

A: She said she would.

Q: So what happened next?

A: Officer Skidis, who was also present, he left with Ms. McArthur to come to the State's Attorney's office. I went back up onto the porch area where Mr. McArthur was, told him what we was doing. And Mr. McArthur came out on the porch area, it's a wooden porch area, and stood there by me.

Q: Now, did you instruct Mr. McArthur to you [*sic*] come out of his trailer?

A: I don't recall how he actually came out, whether I told him or if he walked out on his own.

Q: And from that moment on, did you refuse to allow Mr. McArthur to return to his home.

A: No, sir.

Q: Did you refuse to allow him to enter the home without you being present?

A: Yes, sir.

Q: So you refused him the right to go into his own home, alone, from that point forward; is that correct?

A: Without me, sir.

Q: And was his mother, Mary Heddin, also present at the scene?

A: She came after, either he, Mr. McArthur, had asked to go in and use the phone. And I allowed him. We went in, and he called. And I believe that's when Mrs. Heddin came down there to be with Chuck or Mr. McArthur.

Q: And did you make the same statement to her that she would not be permitted to go in the home without your accompanying her?

A: Yes, sir.

Q: And did you continue to prevent Mr. Heddin, excuse me, Mr. McArthur from going in the home until what happened?

A: He went inside at least two or three times to get cigarettes, to use the phone, to call his sister. And I just accompanied him each time. And by accompanying Mr. McArthur, I accompanied him by basically just stepping right inside the door and just stood by the doorway the entire time, basically.

Q: All right. And was there a point at which the other officers returned?

A: Yes, sir.

Q: And did your procedure of either accompanying Mr. Heddin (sic) inside the home or not allowing him to go in alone continue until the other officers returned and executed the search warrant?

A: Yes, sir. It did.

Q: And upon the execution of the search warrant, they found some cannabis?

A: Yes, sir.

Q: And you, then, arrested Mr. McArthur at that point; is that correct?

A: I personally didn't, sir. It was Officer Skidis who placed Mr. McArthur under arrest.

Q: And that arrest took place at that time?

A: After the evidence was located, after the search warrant was done.

MR. JUSTICE: That's all the questions I have.

THE COURT: Mr. Willis.

MR. WILLIS: Thank you, Your Honor.

CROSS-EXAMINATION
BY MR. WILLIS:

Q: Assistant Chief Love, when Mrs. McArthur informed you and Officer Skidis that there was dope in the residence, did she just say that; or did she, at some point, was she more specific in what she indicated?

A: When I asked her what she actually saw, she was more specific.

Q: Do you recall, sir, what she specifically said when you inquired?

A: She stated that Chuck had slid some dope underneath the couch.

Q: Did you ask her what kind of dope?

A: Yes, sir.

Q: Okay. What did she indicate?

A: That it was pot.

Q: Did she indicate to you if she was familiar with what marijuana looked like?

A: No, sir.

Q: The, at that point, Mr. McArthur was still free to go in and out of the residence; is that correct?

A: Yes, sir.

Q: Were you aware, at that time, as to whether or not Mr. McArthur knew that Mrs. McArthur had seen him place his marijuana under the couch?

A: No, sir.

Q: So you didn't know one way or the other?

A: No, sir. I did not.

Q: You were there on a keep-the-peace call?

A: Yes, sir.

Q: Okay: It's fair to presume that people in those circumstances are going to be made at one another?

A: Yes, sir.

Q: And they're, in fact, going to be probably predisposed trying to get one another in trouble; is that a fair statement?

A: Yes, sir.

Q: In fact, that's what occurred here; is it not? Ms. McArthur basically told on her husband?

A: Yes, sir

Q: Now, there has been much made about your not allowing Mr. McArthur back in the residence. Why didn't you do that?

A: It's been my, through my years of experience or through my training and the schools that I have attended, that whenever you are obtaining a search warrant, you do not want anyone to disturb either the crime scene, disturb evidence, by going in or out of the area where there could be evidence.

Q: And specifically, what is the reason for that?

A: In a situation of where there could be possible drugs or so forth, to let the individual go back inside the residence, they could dispose or destroy the evidence.

Q: And Mr. McArthur was, in fact, aware that you guys knew that his stash was in the residence?

A: Yes, sir.

Q: Was Mr. McArthur, in fact, informed that the reason he couldn't go back in the house alone was so that he couldn't destroy the evidence?

A: Yes, sir. He was.

Q: Now, Mr. McArthur was not under arrest at that point in time?

MR. JUSTICE: I object. That's a legal conclusion.

MR. WILLIS: Your Honor, I think the officer can testify as to whether or not somebody said the magic words.

THE COURT: Well, that's a different question.

MR. WILLIS: Perhaps I should rephrase that.

THE COURT: Okay.

MR. WILLIS: Q. Mr. McArthur had not been told by yourself or any of the other officers at that point that he was under arrest?

A: No, sir.

Q: Had Mr. McArthur been handcuffed?

A: No, sir.

Q: Was Mr. McArthur told that he was not free to leave?

A: No, sir.

Q: Did Mr. McArthur, in fact, ask if he could leave?

A: No, sir.

Q: Was Mr. McArthur given a choice concerning his going back in the house? I guess what I am asking was Mr. McArthur told by yourself or another officer that he had to go in the house or was he only told that if he chose to go in the house that an officer would have to accompany him?

A: When he asked if he could go back in the house to get his cigarettes and use the telephone, I advised him I would need to go back in with him, reference the evidence issue.

Q: So you had made it plain to him that, in fact, that was only if he went into the residence?

A: Yes, sir.

Q: In fact—May I have a moment, Your Honor?

THE COURT: Uh-huh.

MR. WILLIS: Q. Assistant Chief Love, you indicated that when you, in fact, went back in the residence with

Mr. McArthur that you just basically stepped in the doorway; is that correct?

A: Yes, sir.

Q: The purpose for that being just to make sure he wasn't doing anything he shouldn't have been doing?

A: Yes, sir.

Q: Was there any search made of the residence prior to the time the warrant came back?

Q: No, sir.

A: The only search that was undertaken was after Judge Flannell had issued the search warrant; is that correct?

A: Yes, sir.

Q: And there were a couple of items of paraphernalia and some cannabis discovered?

A: Yes, sir.

Q: Did Mr. McArthur make any comment about that?

A: After he, we had executed the search warrant and the cannabis and drug paraphernalia was found and he was placed under arrest, he made some comments to me.

Q: Do you recall what those were?

MR. JUSTICE: Object. It's irrelevant.

MR. WILLIS: I'll withdraw at this point. I have no other questions[.]

REDIRECT EXAMINATION
BY MR. JUSTICE:

Q: Why didn't you arrest him before the search warrant was executed?

A: Because, at that point, sir, I, through my training, we had probable cause, I felt, due to Mrs. McArthur's statement, that I felt that it was best to wait until we got the search warrant to find the evidence. If we got search warrants granted, then once we found the evidence, that's when I placed, or Officer Skidis placed Mr. McArthur under arrest.

Q: Well, you've told me what you've done. I guess I don't understand why you just didn't go ahead and arrest him if you had probable cause at that time?

A: Again, my training and my experience, I felt that if we could get the search warrant that it would be proper to wait until we found it. If the judge granted the search warrant, we execute it, found the evidence, found the drugs or cannabis, paraphernalia, then we would place him under arrest.

Q: Would you have arrested him if the judge denied the search warrant?

A: I would not have searched the trailer at that point.

MR. WILLIS: I'm going to object to that. That's, I think that's speculative in terms of this.

THE COURT: Mr. Justice.

MR. JUSTICE: I'm trying to get him to explain why he did what he did in sort of a backwards way, I guess.

THE COURT: Well, I'll sustain the objection as to the question was stated.

MR. JUSTICE: I believe that's all the questions I have.

THE COURT: Okay. Thank you.

(Witness excused.)

MR. JUSTICE: We would call Charles Heddin or Charles McArthur.

CHARLES MC ARTHUR,

called as a witness on his own behalf, after being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION
BY MR. JUSTICE:

Q: Would you give us your name, sir?

A: Charles McArthur.

Q: Do you live at Lot 59 Graven's Trailer Court in Moultrie County?

A: Yes.

Q: On April 2, 1997, at about 3:15 in the afternoon, did the police officers come to your house to assist your wife with moving her stuff out?

A: Yes.

Q: At that time, had you consumed any alcohol, any illegal substances or anything that would alter your powers of observation?

A: No, sir.

Q: Did your wife move some of her stuff out?

A: Yes.

Q: At any time during the time your wife was moving out, did she have, or excuse me, were there police officers inside your trailer?

A: No, not inside.

Q: Officers were located where?

A: Out on the porch, I believe. I was inside.

Q: After your wife left, did an officer come to your door?

A: Yes.

Q: Who was that, Officer Love?

A: Yes.

Q: What did he say to you?

A: He said that my wife told him that she saw marijuana in the house. And he asked if he could search.

Q: And what was your response?

A: I said, not without a search warrant.

Q: And then what happened?

A: Then he asked my wife if she would go try to get the warrant through the judge.

Q: Did you hear this conversation?

A: Yes.

Q: Go ahead.

A: And she said yes. And I was outside. And there I stayed until the warrant came.

Q: Did you ask to go back in the house?

A: Yes.

Q: And did you go back, did you ask to go in the house unaccompanied?

A: Yes.

Q: Were you given permission to do so?

A: No.

Q: All right. More specifically, let's talk about that first conversation. Did, at some point, did you ask the officer or tell the officer you were going back in your house?

A: No.

Q: Okay. How did it come up that you were, you learned that you were not allowed to go back in your trailer?

A: I asked if I could go back in while they were waiting on the warrant. And he told me not without an officer present with me.

Q: And if you had been allowed to go back in the house, what would you have done?

A: I would have destroyed the marijuana.

Q: Did you ask the officer to go back in the house for that purpose?

A: Not, I didn't specifically say I wanted to go in to destroy anything that might be there. But I asked if I could go in until they returned with a warrant.

Q: Or not with a warrant, right?

A: Right.

Q: And how long was it before they returned with the warrant?

A: Over an hour. Maybe, even closer to two. I'm not really sure, exactly. But I know it was at least an hour.

Q: And what did you do during that entire time?

A: Stood on the porch.

Q: Was there an occasion where you went inside the house to get some cigarettes with the officer?

A: Yes.

Q: And was there another occasion when you went inside the house with the officer to call your mother?

A: Yes.

Q: Any other times you went inside the house?

A: I went in; I don't remember if I called my sister when I called my mom. But I know I called her too.

Q: On each of those occasions, the officers would not let you go in unless they went with you?

A: Right.

Q: And you had expressly told the officer that they were not permitted to come into the house without your permission?

A: Yes.

Q: Without a warrant?

A: (Nodded.)

Q: Say yes or no out loud.

A: Yes.

MR. JUSTICE: That's all the questions I have.

MR. WILLIS: Thank you your Honor.

CROSS-EXAMINATION
BY MR. WILLIS:

Q: Mr. McArthur, the officers also asked if you had any drugs in the house; didn't they?

A: Yes.

Q: Okay. And you lied; and you told him no, there weren't any drugs in the house; is that correct?

A: Yes.

Q: And I understand your testimony, sir, if I understand this correctly, you wanted to go back in the house, unobserved, so that you could destroy the evidence?

A: Yes.

Q: Did, at what point did the officers tell you that you were actually under arrest?

A: After the search warrant was executed and when they came back with the search warrant and went in the house, I showed them where it was at. And that's when I was placed under arrest.

Q: Okay. Now, Officer Love had indicated, did Officer Love or any of the other officers indicate to you that you weren't free to leave?

A: To leave the residence?

Q: Just to go away, if you needed to go to work or go to the store or something like that–

A: No.

Q: –go talk to your lawyer or go to your mom's?

A: No, they never told me I couldn't.

Q: Couldn't leave. Okay. Did they put you in handcuffs?

A: After I was arrested.

Q: Okay. That wasn't until after the warrant was served; is that correct?

A: Right.

Q: Okay. Did they search your person?

A: Yes.

Q: Okay. When did that occur?

A: After they found the marijuana.

Q: So after the warrant was executed. Did they read you your Miranda rights?

A: Yes.

Q: Okay. Did that also occur after the warrant was executed?

A: Yes.

Q: Now, Mr. McArthur, Officer Love told you that you could, in effect, that you could either wait outside or if you went back in that the officer would have to go with you; is that right?

A: Yes.

Q: So he, in fact, allowed you to go in for the purpose of making a phone call?

A: Right.

Q: Did he conduct any search while he was in there during that period of time?

A: No. The phone was just by the front door.

Q: Okay. So it wasn't a matter that you had to go all the way to the back of [the] trailer or anything of that nature?

A: No.

Q: So and, in fact, the officers basically respected your request to get a warrant; did they not?

A: Yes.

MR. WILLIS: I have no other questions.

MR. JUSTICE: No redirect.

THE COURT: Okay. Thank you[.]

(Witness excused.)

MR. JUSTICE: That's our evidence.

THE COURT: Anything?

MR. WILLIS: Your Honor, the only other thing I would ask, is I would ask the court to refer specifically to the records before the court being the affidavit, the Affidavits for Warrant, the Application for Search Warrant and the Warrant itself as it was previously entered by Judge Flannell in their case.

THE COURT: I have been handed 97-MR-2. Do you want to look at it, Mr. Justice?

MR. JUSTICE: No, I have copies of that, Your Honor. I'm not sure judicial notice should be taken for the purposes of this motion. It's what took place by these officers at this scene not what took place in Judge Flannell's office that is relevant to this hearing.

THE COURT: Okay. Any comment about this file?

MR. WILLIS: In reference to 97-MR-2, Your Honor, the issue of probable cause is an objective one. I think that in not, in not all search warrant cases is there involved probable cause also to arrest. This, however, is different. And I believe that the court can consider that.

Because that's an objective inquiry. And I think that the best evidence for that is the affidavits as were ruled on by the court earlier in issuing the search warrant in this case.

MR. JUSTICE: Judge, may I make one –

THE COURT: Sure. Go ahead.

MR. JUSTICE: Basically, what he is asking you to do is defer your decision to Judge Flannell's decision to issue the warrant. And that's not the issue here. This is a de novo hearing where you make a decision based upon the facts in this case.

THE COURT: Okay. The file is here, as I said. I haven't looked at it, but it's here. Let's go ahead and do the arguments first. And then we'll go from there. Mr. Justice.

MR. JUSTICE: Your Honor, I believe I gave you copies of my cases with my motion. They are not attached?

THE COURT: No, they're not. They are cited in Paragraph 5, but they're not copied.

MR. JUSTICE: They're not attached to the motion?

THE COURT: Do you want to look at it? They're not here.

MR. JUSTICE: No, no.

MR. WILLIS: For what it's worth, counsel, I didn't get them either. I got the cites, but–

THE COURT: It says, Paragraph 5 says: Copies attached. But they're not attached.

MR. JUSTICE: My humble apologies.

THE COURT: No problem. They're just not here. That's all I'm saying.

MR. JUSTICE: Well, I want you to read the law.

THE COURT: So do I.

MR. JUSTICE: The essence of our position is pretty straightforward.

The Supreme Court has said that, that searches and seizures of any kind require the meeting of certain circumstances. If a seizure is improper, then anything that follows from that, in the form of the gathering of evidence, must be suppressed. To say that a man can't go in his own home without an officer present, is clearly a seizure. So the question becomes, did there, was that seizure, in other words, preventing him from going in his own home. And I know exactly why the officer did it. And we tried to make the record very clear as to what would have happened if he did do it. The problem is, he made the decision not to arrest him until after there was a, his suspicions were confirmed. That's what he won't say, and that's what really happened.

They suspected, based upon this lady's statement, that there was pot inside. And they wanted that pot before they would arrest him. If, until that decision had been made or that search had been done, there was no evidence of a crime or insufficient evidence. And what our position is, based upon the *Dunaway* cases and the Illinois cases that have accepted it, is that if you gather this evidence because of an illegal seizure, then it must fall. And there is no question they got this evidence be-

cause of this officer's conduct in refraining from allowing him to go in his home. Because if he had not refrained [*sic*] him, it would have been gone by the time the search warrant was there. And so the evidence remained available for the sole purpose or solely because this officer kept this man on the porch.

Now, I guess we need to ask ourselves, if officers suspect illegal conduct and they, and they come to the house and they say you can't go in your house, then they are, in essence, executing a search warrant or seizing property inside that house without a search warrant. Because they have not allowed that house to be used by its owners. And that's the tough part about this case. And that's the unfair part about this case, is they have, in essence, sealed off that house until a judge can give them a stamp of approval to enter it.

You can't do that under the Fourth Amendment. Because our homes are sacrosanct. They are protected. You can't effect the right of anyone within their home without a search warrant. And they did that to him for an hour while they waited. And that hour allowed this evidence to remain intact and not be destroyed and allowed the warrant to find something.

And I know this is a very unappealing argument to the court. But what is at stake here is the freedom of one's home versus a little bit of marijuana and also the law.

Thank you.

MR WILLIS: Your Honor, the counsel, I think, and not intentionally, misstates the law. I understand what he's driving at. But they're really several issues in this.

The issue in this case is not one of the home is absolutely sacred. The Fourth Amendment to the United States Constitution and the concurrent provisions of the Illinois Constitution do not prohibit warrantless searches. They don't prohibit warrantless seizures. They simply prohibit unreasonable searches and seizures.

This issue, pretty much on point, was addressed by the United States Supreme Court in the case of *Segura*, S-E-G-U-R-A, *versus United States*. That's to be found at 468 US 796. I'm quoting from 82 Lawyers' Edition 2d 599.

In the *Segura* case, the officers had probable cause to believe that, in fact, an offense had been committed. The officers in that instance actually arrested some individuals. And basically, secured the premises pending the issuance of a search warrant.

In this instance, I submit Number 1, that Mr. McArthur was not under arrest. That, I mean he did not testify, as I recall, that he felt he was under arrest or felt he wasn't free to leave. He wasn't handcuffed. He wasn't told he was under arrest. He wasn't Mirandized. He wasn't searched until after the warrant was executed. This is true. However, I submit that, in this instance, that probable cause existed for Mr. McArthur's arrest from the get go.

You have, in this instance, an individual who's a reliable individual, who indicates to the officers that she had just immediately before had observed a crime, was specific in terms of what she told the officers that she had observed Mr. McArthur in possession of a quantity of cannabis. That, in and of itself, is sufficient to arrest Mr. McArthur. Probable cause is a very low burden of

proof. In this instance, however, the officers, due to the procedures that they have been trained by, chose not to effect the arrest but to do what I believe is the constitutionally reasonable thing. That is, they simply engaged in the seizure, not of Mr. McArthur because he was free to go, but a seizure of his residence.

The Supreme Court Chief Justice Berger [*sic*] in his opinion in *Segura*, which is at 604 of the Lawyer's Edition, second cite of that, indicates that, talking about two questions in this instance: Whether the entry and internal securing of the premises constituted an impermissible seizure of all the contents of the apartment. And then he goes on to talk about, you know, should evidence seized pursuant to a warrant, after the warrant was obtained in that case, it was 19 hours later, not an hour as in this case, should have been suppressed as fruit of the illegal entry, which is similar to what counsel is arguing.

Mr. Justice [*sic*] Burger indicated that on the first question, the question of whether the entry and securing of the premises constituted an impermissible seizure, indicated: ["]On this first question, we conclude that, assuming there was a seizure of all the contents of the petitioner's apartment when agents secured the premises from within["] – [*sic*] And here again, the officers largely stayed out of the premises; they didn't go inside it, only for limited purpose and then did the search here. [*sic*] – ["]that seizure did not violate the Fourth Amendment.["]

["]Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and,

for no more than the period herein involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.["]

And the court, again, at, I believe, page 609 of this decision in part IV deals with this question more in depth. On 609, in the second paragraph on the right-hand column, the court again indicates: ["]By its terms, the Fourth Amendment forbids only "unreasonable" searches and seizures. Assuming, *arguendo*, that the agents seized the entire apartment and it's contents, as petitioners suggest, the seizure was not unreasonable under the totality of the circumstances.["] The court then, again, goes on and talks about that there are different interests implicated by seizure than there is by a search.

In terms of a seizure, and what the officers here did was simply deny Mr. McArthur the ability [to] commit a crime, to obstruct justice, which he has indicated he would have done. He would have destroyed the evidence. There can be no constitutional right to commit an offense. And, in fact, in this circumstance, I would submit that, had the officers, in fact, simply skipped the warrant procedure and simply seized the evidence, they would be within their authority to do so, because that constitutes exigent circumstances. In this instance and where the defendant has admitted in pleadings and under oath that it was his intention to destroy the evidence, the officers are empowered to prevent that.

In this instance instead of immediately arresting Mr. McArthur and searching the residence without a war-

rant, they did what I would submit was the absolute, most constitutionally reasonable thing for them to do. And that is they simply secured the residence for the sole purpose of preventing the destruction of the evidence and submitted the issue to a neutral, detached magistrate to allow a judge to make the determination whether there was probable cause.

And in this instance, I would submit to the court that there has been no violation of Mr. McArthur's rights, that he has no right to, in fact, destroy evidence and that the action engaged in by the officers is clearly, under *Segura*, justifiable. And it is not unreasonable for terms of the Fourth Amendment or the Illinois statutory and constitutional procedures basically tracked on [*sic*].

THE COURT: Mr. Justice.

MR. JUSTICE: Your Honor, the *Segura* case is dependent upon a very important fact. And it's on page 613. And that is the agents entered and secured the apartment from within. They, apparently, the court accepted the fact that they had probable cause to go in and enter the apartment and arrest people inside the apartment. And they made an arrest, and then they secured the place after making the arrest and got a search warrant. We don't have those facts in this case.

I think you understand the issue. I won't beat a dead horse.

MR. WILLIS: Your Honor, also on Page 613, the court indicates that, on the left-hand side here, on the end of that long paragraph, that, basically, the initial entry, legal or not, does not affect the reasonableness of the seizure. And again, what we are talking about is the

seizure of the residence solely for preventing the destruction of the evidence pending a warrant under these circumstances [was] reasonable.

The court in *Segura*, on page 613, indicates that under either method, whether entering and securing from within or a perimeter stakeout, with agents controlling the apartment pending the arrival of a warrant, both an internal securing and a perimeter stakeout interfered to the same extent with the possessory interest of the owners. Under these circumstances, I submit that there is nothing at all unreasonable about the officers[']actions.

THE COURT: Anything else?

MR. JUSTICE: No.

THE COURT: Okay. Let's take a short break, and let me look at the materials, probably 10 or 15 minutes.

MR. WILLIS: That's fine, Your Honor.

MR. JUSTICE: That would be fine.

(Recess.)

THE COURT: Thank you for your patience. I have been reviewing materials provided by both attorneys. And I appreciate that. It's a tough case. It's the first time I remember having a case where the question of search and/or seizure turned on whether a person was allowed to go into his own home or not. Usually, it's the other way around, you can't go away from here and, rather than to go into this place.

And in some ways it is similar to a vehicle search situation were a stop is made and the vehicle is held until a warrant is obtained. It's not exactly like that, but

it reminds me of that. Looking at the cases that you have provided, I took particular interest in the *Parker* case, *People versus Parker*, 1996 Illinois Appellate Court case. That was the case where the police had set up metal detectors in a school, a young man approached, entered the school building, approached the metal detector, apparently observed what was happening, turned to leave and was stopped by an officer. The officer said, ["]you're required to go through the metal detector.["] The student then lifted the front of the shirt, and a gun was visible to the officer. That was taken by the officer. The student was arrested.

The analysis in that case, I think, is particularly interesting as it relates to this case. They are not any way identical. But in the *Parker* case, there was a motion to suppress and to quash arrest. The trial court granted that motion. The Appellate Court affirmed. And I only mention that one because I found it particularly helpful. I think the *Segura* case is distinguishable from the situation at hand.

I did look at the other file, so that you know, for one reason. I wanted to see what the time frame was between the, testimony here today was that this incident occurred at about 3:15 p.m. I wanted to check the search warrant to see when it was issued just to see what kind of a time lag there was. It was 5:05 so just slightly less than two hours, which is consistent with the testimony today. Someone said it was more than an hour, maybe close to two hours. And that's about what it was. But I mentioned that so that you know I looked at that file for that purpose.

I don't have much else to say. I think that, based on the law, and I have commented on, particularly, the *Parker* case, I think the motion should be granted. Show the Motion to Suppress is granted.

Where do we go from here is the next question.

MR. WILLIS: Your Honor, it would be my intention to file a Certificate [of] Impairment. Given that, I would suggest the bench trial simply be continued until further order.

THE COURT: Any disagreement with that?

MR. JUSTICE: Your Honor, under these circumstances, we would ask the defendant be released from bond and his bond returned.

MR. WILLIS: I don't object to that, because obviously it's going to be 18 months probably before the Appellate Court even sees this.

THE COURT: Let me do it this way. I'll just show that the allotment for trial is vacated, and the bond is released. We will wait to see what happens.

MR. JUSTICE: That's enough for the clerk to do what she needs to do?

MR. WILLIS: It should be.

THE COURT: I think so. I will leave copies of case authority in the file and look forward to hearing more from the Appellate Court.

MR. JUSTICE: Fifth District, right?

MR. WILLIS: Fourth District, counsel.

THE COURT: I'll just say the Appellate Court, wherever they may be.

Which were all the proceedings had and entered of record in said cause.

[Court Reporter's Certification Omitted]

Supreme Court, U.S.
FILED
JUL 13 2000
CLERK

(3)

No. 99-1132

In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois

BRIEF FOR PETITIONER

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3280

QUESTION PRESENTED

Is it reasonable under the Fourth Amendment for police officers who have probable cause to believe that a residence contains evidence that could readily be destroyed to secure the residence by preventing its occupant and others from entering unaccompanied while the officers seek a search warrant?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT:

THE FOURTH AMENDMENT PERMITS OFFICERS WHO HAVE PROBABLE CAUSE TO SEIZE AND SECURE A RESIDENCE FROM THE OUTSIDE FOR A REASONABLE PERIOD OF TIME WHILE SEEKING A SEARCH WARRANT 9

A. The State's Interest in Securing Evidence Against Destruction Outweighs the Lesser Fourth Amendment Interests Implicated by the Temporary Seizure of Respondent's Residence 10

B. The Constitution Does Not Require That Police Obtain a Seizure Warrant Before Temporarily Seizing a Residence While Awaiting a Search Warrant 15

C. Because Officer Love Was Entitled to Bar Respondent from Entering His Trailer Unless Escorted, the Officer's Observation of Respondent Inside the Trailer Was a Consensual Acceptance of That Condition 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases PAGE(S)

Arkansas v. Sanders, 442 U.S. 753 (1979) 16

Chambers v. Maroney, 399 U.S. 42 (1970) 16, 20

Commonwealth v. Blake, 604 Mass. 823, 604 N.E.2d 1289 (1992) 18

Cupp v. Murphy, 412 U.S. 291 (1973) 21, 22

Dunaway v. New York, 442 U.S. 200 (1979) 10

Jeffers v. United States, 342 U.S. 48 (1951) .. 14, 19, 20

Jones v. State, 648 So. 2d 669 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995) 18

Michigan v. Summers, 452 U.S. 692 (1981) 14

Mincey v. Arizona, 437 U.S. 385 (1978) 19, 20

People v. Bennett, 17 Cal. 4th 373, 949 P.2d 947 (1998) 21

People v. Griffin, 727 P.2d 55 (Colo. 1986) 18

People v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999). 1, 5

Preston v. United States, 376 U.S. 364 (1964) 14

Schmerber v. California, 384 U.S. 757 (1966) 14

Schneckloth v. Bustamante, 412 U.S. 218 (1973) 22

Segura v. United States, 468 U.S. 796 (1984) ... *passim*

State v. Alayon, 459 N.W.2d 325 (Minn. 1990), *cert. denied*, 498 U.S. 1049 (1991) 18

State v. DeLane, 207 N.J. Super. 45, 503 A.2d 903 (App. Div. 1986) 18, 19

State v. Hull, 210 Conn. 481, 556 A.2d 154 (1989) 18

State v. Kin Ng, 104 Wash. 2d 763, 713 P.2d 63 (1985) 19

State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995) 19

State v. Smith, 458 N.W.2d 779 (S.D. 1990) 19

Trupiano v. United States, 334 U.S. 699 (1948) 19

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 10, 11

United States v. Chadwick, 433 U.S. 1 (1977) ... 11, 16

United States v. Crespo De Lano, 838 F.2d 1006 (9th Cir. 1987) 18

United States v. Hall, 50 M.J. 247 (C.M.A. 1999) 18

United States v. Jacobsen, 466 U.S. 109 (1984) 11

United States v. Mendenhall, 446 U.S. 544 (1980) 13

United States v. Morales, 868 F.2d 1562 (11th Cir. 1989) 18

United States v. Place, 462 U.S. 696 (1983) 11

United States v. Riley, 968 F.2d 422 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992) 18

United States v. Roby, 122 F.3d 1120 (8th Cir. 1997) 18

United States v. Scheets, 188 F.3d 829 (7th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 837 (2000) 18

United States v. United States District Court, 407 U.S. 297 (1972) 11

United States v. Villamonte-Marquez, 462 U.S. 579 (1983). 11

United States v. Watson, 423 U.S. 411 (1976) 14

Vale v. Louisiana, 399 U.S. 30 (1970) 10, 19, 20, 21

Constitutional and Statutory Provisions

U.S. Const., amend. IV 2

28 U.S.C. §1257(a) 1

720 ILCS 550/4(a). 5

720 ILCS 600/3.5(a) 5

725 ILCS 5/107-2(c) 14

725 ILCS 5/102-15 14

730 ILCS 5/5-8-3(a)(1) 5

730 ILCS 5/5-8-3(a)(3) 5

Other

Erwin N. Griswold, *Criminal Procedure 1969 - Is It a Means or an End?*, 29 Md. L. Rev. 307 (1969) 7, 10, 20

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Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 Hastings L.J. 283 (1988) 21

OPINIONS BELOW

The oral ruling of the Circuit Court for the Sixth Judicial Circuit, Moultrie County, Illinois, granting Respondent's motion to suppress evidence was transcribed at the conclusion of that court's suppression hearing. It is reprinted in the Joint Appendix, Jt. App. 39-41. The Appellate Court of Illinois, Fourth District, issued its opinion affirming that ruling on May 7, 1999. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999). That decision is reprinted in the appendix to the Petition for Writ of Certiorari, Pet. App. 1-14. The October 6, 1999, order of the Supreme Court of Illinois, denying Petitioner's Petition for Leave to Appeal to that court, is also reprinted in the appendix to the Petition for Writ of Certiorari, Pet. App. 15.

JURISDICTION

The Appellate Court of Illinois, Fourth District, entered its judgment on May 7, 1999, and the Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal to that court on October 6, 1999. The Petition for Writ of Certiorari was timely filed on January 4, 2000 and this Court granted that Petition on May 1, 2000. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a) because Respondent has claimed a violation of his rights under the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case puts in issue the Fourth Amendment to the United States Constitution, which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV (hereinafter "the Fourth Amendment").

STATEMENT OF THE CASE

Respondent Charles McArthur was arrested and charged with misdemeanor violations of Illinois' drug and paraphernalia possession laws after a search of his residence, conducted pursuant to a warrant, disclosed approximately 2.3 grams of marijuana and paraphernalia, including a smoking pipe, hidden under a sofa. The trial court, after an evidentiary hearing, granted Respondent's motion to suppress those items, finding that police officers had violated his rights under the Fourth Amendment when they secured his residence for approximately two hours while obtaining the search warrant. Illinois' intermediate appellate court affirmed that ruling, and the Supreme Court of Illinois denied leave to appeal. The People of the State of Illinois respectfully request that this Court reverse those rulings.

On the afternoon of April 2, 1997, two officers of the Sullivan, Illinois, police department went to the home of

Respondent and his wife, Tera McArthur ("Tera"). The home was a trailer located in a trailer park. Tera had asked them to accompany her to the trailer to "keep the peace" while she moved her belongings out. Jt. App. 15, 20. After Tera removed her possessions from the trailer, she told the officers that her husband (Respondent) had "dope" in the trailer. The senior officer, Assistant Police Chief John Love, asked Tera to describe what she had seen. Tera said she had seen Respondent hide "pot" under the couch in the trailer. Jt. App. 15-16, 19.

Officer Love knocked on the door of the trailer, and Respondent answered. Officer Love told Respondent that his wife had informed the officers that he had marijuana in the trailer. Respondent denied the accusation. Officer Love asked Respondent if he could enter the trailer and search it, but Respondent declined to permit the officer to search without a warrant. Jt. App. 16, 26, 29. When this conversation concluded, Respondent was outside the trailer. Jt. App. 16, 26.[1]

Officer Love asked Tera whether she would be willing to tell a judge what she had seen, and she agreed to do so. Officer Love's partner then left with Tera to go to the local prosecutor's office for the purpose of seeking a

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[1] The record does not make clear exactly when or how Respondent came to be outside the trailer, although he was outside at the time he refused to consent to a warrantless search. Jt. App. 16, 17, 26. Respondent did not testify that he was asked or otherwise compelled to step out of the trailer, and Officer Love testified that he did not recall whether he asked Respondent to come outside or Respondent did so on his own (Jt. App. 17).

search warrant for the trailer. Jt. App. 16-17, 26. Officer Love remained behind with Respondent. He did not arrest Respondent or tell Respondent that he was not free to leave. Jt. App. 22, 29. When Respondent asked Officer Love if he could go back inside the trailer to wait for the warrant, however, Officer Love told him that, until the warrant was or was not obtained, Respondent would not be allowed to reenter the trailer unless accompanied by the officer. Jt. App. 17, 27.

Respondent and Officer Love waited outside the trailer for about two hours before other officers returned with a search warrant for the trailer.[2] Jt. App. 3-10, 18, 27. During that period Respondent asked Officer Love if he could go back into the trailer, and was told that he could do so only if the officer accompanied him. At least twice Respondent entered the trailer to get cigarettes and call family members; each time, Officer Love stood in the doorway of the trailer and observed Respondent as he did so, but made no further entry into and no search of the trailer. Jt. App. 17, 18, 22-23, 27, 30. At the suppression hearing, Respondent admitted that his purpose in asking to go back into the trailer was to destroy the evidence concealed there and that he would have done so had he

[2] The trial judge concluded that approximately two hours elapsed between the officers' arrival at the trailer and the issuance of the warrant. Jt. App. 40. Officer Love testified that he arrived at the trailer at approximately 3:15 p.m. (Jt. App. 25), and the warrant states on its face that it was issued at 5:05 p.m. (Jt. App. 4). Nevertheless, Tera McArthur, in her affidavit submitted in support of the warrant, stated that she saw the marijuana in the trailer at approximately 3:40 p.m., Jt. App. 9, suggesting that the actual time may have been shorter.

been permitted to enter alone, although he did not announce that purpose to Officer Love. Jt. App. 27, 29. At some point during this period Respondent's mother came to the trailer. She was also told by Officer Love that she could not enter unaccompanied. Jt. App. 17-18. When other officers returned with the warrant, Respondent showed the officers where a small quantity of marijuana and paraphernalia were hidden. He was then arrested. Jt. App. 18, 23, 29-30.

Respondent was charged with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of less than 2.5 grams of marijuana, all misdemeanor violations. 720 ILCS 600/3.5(a) and 550/4(a).[3] He filed a motion to suppress the items found at his residence, arguing that barring him from entering the trailer while the search warrant was sought had amounted to an illegal arrest, and that the marijuana and paraphernalia recovered when the warrant was executed were the products of that arrest because, had he not been kept outside, he would have destroyed them.

After an evidentiary hearing at which Respondent and Officer Love testified, the trial court granted Respondent's motion to suppress. Jt. App. 39-41. The State appealed, and the Appellate Court of Illinois, Fourth District, affirmed. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999); Pet. App. 1-14. The court

[3] Under Illinois law, possession of not more than 2.5 grams of marijuana is a Class C misdemeanor punishable by not more than 30 days of imprisonment, while paraphernalia possession is a Class A misdemeanor punishable by less than one year of imprisonment. 730 ILCS 5/5-8-3(a)(1) and (3).

conceded that the police officers had "probable cause to secure the residence." Pet. App. 12. The court nonetheless held that barring Respondent from reentering his home unaccompanied amounted to his "constructive eviction" therefrom, *id.*, although the court later observed that it was "unclear whether the police effected a seizure of [Respondent's] person when they secured his residence and, if so, whether the seizure was reasonable," Pet. App. 13-14. The court distinguished the instant case, wherein Respondent was on the premises at the time the home was seized, from one in which the police secure premises and bar entry by anyone thereafter arriving. Pet. App. 12. Similarly, the court distinguished that portion of the opinion in *Segura v. United States*, 468 U.S. 796, 813 (1984) (Opinion of Burger, C.J., joined by O'Connor, J.), that had declared that the seizure of a residence presents a lesser interference with the occupant's possessory interest if the occupant is then in custody, noting that Respondent herein was present and not under arrest at the time he was barred from entering his trailer. Pet. App. 7. The court also concluded that Officer Love conducted both a search and a seizure "from the inside" when he stood in the doorway of the trailer to observe Respondent as he made phone calls and retrieved his cigarettes. Pet. App. 12-13.

The State filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois. On October 6, 1999, that court denied the petition. The State's Petition for a Writ of Certiorari was filed in this Court on January 4, 2000 and granted on May 1, 2000.

SUMMARY OF ARGUMENT

This case presents the question whether, as an alternative to either the loss of evidence or a warrantless search to recover it, a police officer may "maintain the status quo"[4] by prohibiting entry to a residence by its unarrested occupant while a fellow officer seeks and obtains a search warrant. By securing the residence from the outside, the officers in this case honored Respondent's privacy rights while assuring the preservation of evidence that, but for their action, would certainly have been destroyed.

The Fourth Amendment's requirement that searches and seizures be reasonable prescribes a balancing of the intrusion upon an individual's interests in privacy and possession against the State's interest in detecting and prosecuting crimes. The officers in this case visibly executed that balance, assuring that evidence was preserved while leaving Respondent's right to the privacy of his home, as well as his own liberty, virtually intact. The balance of interests required by the Fourth Amendment demonstrates that the actions of the police officers in this case were reasonable. The infringement upon Respondent's rights was deliberately minimal. The securing of Respondent's trailer was a seizure, not a search, and thus effected only his possessory interests. These interests are of less concern under the Fourth Amendment than the privacy interests that would have been implicated by an entry and search. Respondent lost posses-

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[4] Erwin N. Griswold, *Criminal Procedure 1969 - Is It a Means or an End?*, 29 Md. L. Rev. 307, 317 (1969).

sion of his home for only the brief and reasonable period required to obtain a judicial warrant. Moreover, contrary to the view of the Appellate Court, Respondent himself was not in any significant way seized as a result of this procedure, as he remained free to go anywhere in any manner except unescorted into his home.

The State's interest in carrying out this procedure was substantial. The officers had firsthand, current information constituting probable cause to believe that evidence of a crime was inside the trailer. The State has a strong interest in assuring that such evidence is not destroyed while it seeks to invoke judicial process in order to gain access to it. In this case, of course, the officers' concern for the security of that evidence was well-founded; the evidence ultimately seized under the warrant certainly would have been lost had the officers not barred Respondent's entry.

The police officers were not required to obtain a separate warrant before temporarily seizing Respondent's trailer while a search warrant was sought. Probable cause was sufficient to permit the officers to secure the residence provisionally pending the issuance of a warrant to search. This Court has endorsed temporary seizures of property or persons pending further investigation based on probable cause. That power is no less appropriately exercised where the warrantless seizure of a home is at issue, particularly when the seizure is carried out as an alternative to the intrusion of a warrantless search. Endorsement of the practice of securing from the outside, when appropriate and effective, will encourage the use of search warrants, as it did in this case, by allaying the

fears of officers that evidence will be lost. It will correspondingly discourage, or at least confine, warrantless searches intended to quell those fears.

Finally, the Appellate Court below was wrong in finding that Officer Love secured Respondent's home "from the inside" (Pet. App. 12) by standing in the doorway and observing Respondent as he made telephone calls and got cigarettes. Those brief entries yielded nothing incriminating, and the court never linked them in any way to the discovery of the evidence later obtained by warrant. Because the officer was entitled to bar Respondent's entry for the limited period required to obtain the warrant, Respondent must be deemed to have consented to those entries. In fact, they militate in favor of a finding of reasonableness, as they manifest Officer Love's endeavor to minimize the intrusion imposed by the temporary securing of Respondent's home.

ARGUMENT

THE FOURTH AMENDMENT PERMITS OFFICERS WHO HAVE PROBABLE CAUSE TO SEIZE AND SECURE A RESIDENCE FROM THE OUTSIDE FOR A REASONABLE PERIOD OF TIME WHILE SEEKING A SEARCH WARRANT.

The police officers in this case effected a temporary warrantless seizure of Respondent's residence in order to preserve the existence of incriminating evidence while they sought and obtained a search warrant. This brief infringement upon Respondent's possessory interest in his home allowed the officers to preserve evidence contained inside from certain destruction without resort to

the primary affront against which the Fourth Amendment stands: a warrantless entry into a home. This procedure thus answers a need that has been noted by distinguished constitutional commentators, both on and off the bench.[5] It represents a reasonable accommodation of interests that deserves this Court's endorsement.

A. The State's Interest in Securing Evidence Against Destruction Outweighs the Lesser Fourth Amendment Interests Implicated by the Temporary Seizure of Respondent's Residence.

The Fourth Amendment to the United States Constitution restricts only searches or seizures that are "unreasonable." This "key principle" calls for "the balancing of competing interests." *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring). In each instance the reviewing court must balance the intrusion upon an individual's personal Fourth Amendment rights against "the public interest" underlying the State's execution of a particular procedure. *United States v. Brignoni-Ponce*,

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[5] *See Vale v. Louisiana*, 399 U.S. 30, 41 (1970) (Black, J. dissenting) ("This case raises most graphically the question how does a policeman protect evidence necessary to the State if he must leave the premises to get a warrant, allowing the evidence he seeks to be destroyed."); Griswold, *supra* n. 4, at 317 ("Does the police officer have any power to maintain the status quo while he, or a colleague of his, is taking the time necessary to draw up a sufficient affidavit to support an application for a search warrant, and then finding a magistrate, submitting the application to him, obtaining the search warrant if it is issued, and then bringing it to the place where the arrest was made[?]").

422 U.S. 873, 878 (1975); *see also United States v. Place*, 462 U.S. 696, 703 (1983) ("We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). In this case the balance falls in favor of the State's interest at the cost of a limited Fourth Amendment intrusion.

By barring Respondent from entering his home while his fellow officer sought a search warrant, Officer Love selected a course of action deliberately designed to mitigate the nature and extent of the intrusion on the Fourth Amendment rights of Respondent. The procedure effected a seizure, and thus implicated interests that figure differently in Fourth Amendment analysis than those implicated by a search. A seizure affects a person's possessory interest in the property seized, while a search affects the maintenance of personal privacy. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). And although both interests are protected by the Fourth Amendment, the physical entry to an individual's home is considered "the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972); *see also United States v. Chadwick*, 433 U.S. 1, 13 and n. 8 (1977).

The infringement upon Respondent's possessory interests imposed by the seizure of his home was mitigated in significant respects. First, the seizure was provisional; it was undertaken only to allow officers to obtain a search

warrant, and was in effect only as long as it took to obtain one. Second, the approximately two-hour period was reasonable; the record would support no suggestion that this time period was excessive or that the officers were not diligent in seeking the warrant or returning to conduct the search. During those two hours Officer Love's partner was able to return to the local police station with Respondent's wife in tow, draft and type (or have typed) a warrant, complaint for warrant, and two affidavits (Jt. App. 3-10), locate a judge and submit them for his review, obtain his approval and return to Respondent's home. Two hours is an eminently reasonable time within which to accomplish these tasks. Certainly it did not approach the 19-hour period this Court commented on in *Segura v. United States*, 468 U.S. 796, 812-13 (1984) (opinion of Burger, C.J., joined by O'Connor, J.).

In addition, Officer Love effectively tempered the effects of the seizure by permitting Respondent to enter the trailer, albeit only under his observation. As discussed *infra* p. 22-24, these instances did not compromise Respondent's privacy rights. They did permit Respondent to exercise some possessory interest in his home by using the telephone and obtaining cigarettes from inside. While the seizure of the home was, so long as it lasted, substantially complete, some aspects of Respondent's possessory right to make use of it were thus extended to him.

The Appellate Court below may have believed that the impoundment of Respondent's trailer also implicated his interest in avoiding an unreasonable seizure of his person. In the operative portion of its decision the court observed that, while the police officers had sufficient

cause to secure Respondent's residence, doing so while Respondent was actually present "amounted to a constructive eviction of [Respondent] from his residence." Pet. App. 12; *see also* Pet. App. 13-14 ("unclear" whether police seized Respondent's person). The court found this case to be different from one in which an occupant arrives after the residence was secured, but did not explain the reason behind that distinction. Pet. App. 12. For purposes of preserving evidence, there should be no distinction between one who is on the scene and one who arrives later, after the premises is already secured; either individual, given the improper motive and opportunity, poses an equal threat to the evidence inside. In this case, Respondent's desire and admitted intention to destroy the evidence if given the chance would not have been diminished had he arrived after Officer Love had secured his trailer from entry.

To the extent the court felt that Respondent was personally seized when he was barred from reentering his trailer, that conclusion is simply wrong. As the court itself acknowledged, Respondent was not told he was under arrest, was not physically restrained, and was "free to go anywhere in the world except back into his trailer by himself." Pet. App. 14; *see also* Jt. App. 22, 29. Absent such restraint, Respondent himself was not seized at all. *See United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (opinion of Stewart, J.). The restriction on a person's personal liberty imposed by the warrantless securing of his residence is "not remarkable," 3 Wayne R. LaFave, *Search and Seizure* §6.5(c), at 366 (3rd Ed. 1996), especially considering that the probable cause that supported that action would also have justi-

fied his warrantless arrest. *United States v. Watson*, 423 U.S. 411 (1976); *cf. Michigan v. Summers*, 452 U.S. 692, 703-04 (1981) (probable cause for search warrant provides connection with occupant justifying detention during warrant's execution).[6]

For these reasons, the impoundment procedure carried out by Officer Love resulted in an infringement of Respondent's Fourth Amendment rights that was substantially mitigated and considerably less extensive than would have been occasioned by a search. By contrast, the State's interest in this case was considerable. This Court has accorded substantial weight to the need of investigating authorities to prevent the destruction, alteration or concealment of evidence of crimes. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *Preston v. United States*, 376 U.S. 364, 367 (1964); *Jeffers v. United States*, 342 U.S. 48, 52 (1951). Officer Love's decision to secure the premises was made based on his desire to prevent anyone from "disturb[ing] evidence", and specifically his concern that Respondent "could dispose [of] or destroy the evidence." Jt. App. 21. The presence of Respondent at the scene and unrestricted by arrest made that concern acute. Respondent's own intentions elevated that concern beyond the level of speculation. Had Officer Love not prevented him from doing so, Respondent would, by his

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[6] Under Illinois law, an officer may make an arrest without a warrant whenever "[h]e has reasonable grounds to believe that the person is committing or has committed an offense." 725 ILCS 5/107-2(c). The term "offense" includes "a violation of any penal statute of this State," 725 ILCS 5/102-15, which would encompass a misdemeanor.

own admission, have destroyed the evidence hidden in the trailer. Jt. App. 27, 29. In this case, then, the officer's concern amounted to a sure thing.

The balance of competing interests tilts in favor of approving the impoundment procedure. The State's interest in preserving the marijuana and paraphernalia hidden in Respondent's home was meaningful, even compelling, in this case. The presence of Respondent, the person with the strongest motive to destroy the items, made such destruction a strong possibility; Respondent's admitted intentions made it a certainty. On the other side of the scale, while Respondent did suffer some loss of the use of his home, this deprivation was confined to a reasonable period directly related to its purpose, namely the securing of a warrant. More critically, the impoundment procedure provided a method by which the more grave intrusion of entry to preserve evidence could be avoided. Where it may appropriately be used, impoundment thus serves the Fourth Amendment's policies not simply by providing a model of restrained police conduct, but also by lessening or eliminating the need or motive for greater intrusion.

B. The Constitution Does Not Require That Police Obtain a Seizure Warrant Before Temporarily Seizing a Residence While Awaiting a Search Warrant.

In securing Respondent's residence and barring his entry, Officer Love acted without a warrant. Indeed, the very purpose of his actions was to freeze the circumstances in place while a search warrant was sought. It is not disputed that Officer Love had probable cause to

believe that marijuana was secreted within Respondent's trailer. Respondent's wife had told him it was there; she had seen it herself. And, when Officer Love asked her specifically where it was, she told him where it was hidden. Because he had probable cause, and because his seizure of Respondent's home did not involve entry and lasted only long enough to allow officers to obtain a judicial search warrant, the seizure of Respondent's trailer required no warrant or showing of particularized exigent circumstances.

The officer's decision to secure the premises in this case accords with this Court's precedent, and in fact with its prescriptions, for preserving the status quo pending the issuance of a search warrant. This Court has stated, on a number of occasions, that police may seize property that they have probable cause to believe contains contraband for the limited period required to obtain a warrant. In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the Court condemned the warrantless *search* of a suitcase found in a car, but observed that the police had acted "commendably" in seizing the suitcase. The proper course of action, in the Court's view, would have been to hold on to the suitcase, unopened, until a warrant could be obtained. 442 U.S. at 761, 766; *see also Chadwick*, 433 U.S. at 13 (locked footlocker); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (automobile). The Court's understanding that these warrantless seizures were reasonable has stemmed from its "preference for a magistrate's judgement," 399 U.S. at 51, and its recognition that a search represents "a far greater intrusion into Fourth Amendment values than [an] impoundment . . .," *Chadwick*, 433 U.S. at 13 n. 8.

These principles should apply with equal force to a residence, so long as privacy interests are not compromised. This Court has directly addressed the seizure of a residence pending issuance of a search warrant only once, without conclusively resolving the issue. In *Segura v. United States*, 468 U.S. 796 (1984), the Court considered a more invasive impoundment procedure; the officers in that case entered an apartment and remained inside for some 19 hours before a search warrant was issued. 468 U.S. at 801. The Court upheld the admissibility of the evidence seized under that warrant, but the portion of the opinion that addressed the constitutionality of the warrantless securing of the apartment garnered only two votes. 468 U.S. at 797 n. †; *id.* at 805-813 (Opinion of Burger, C.J., joined by O'Connor, J.).

Although the instant case is factually distinct from *Segura*, and in particular involves less of an intrusion, the precedential value of that case for this one is clear. Indeed, while the Court was sharply divided on whether a residence could be secured in the more intrusive manner employed in *Segura*, it appears that the entire Court—all nine Justices—agreed that the drug enforcement agents could have secured the apartment without entering in the absence of either a warrant or exigent circumstances. The Chief Justice, joined by Justice O'Connor, felt that "secur[ing] the premises from the outside by a 'stakeout' once the security check revealed that no one . . . [was] in the apartment" would have been "arguably, the wiser course." 468 U.S. at 811. Moreover, the full majority of five Justices joined that portion of the opinion that addressed the connection between the agents' entry and the warrant, in which the Court ob-

served that, "[h]ad the police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here." 468 U.S. at 814. The four dissenting Justices, while critical of the agents' warrantless entry of and extended presence in the apartment, "assume[d] impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when authorities merely seal off the premises pending the issuance of a warrant but do not enter." 468 U.S. at 824 n. 15 (Stevens, J. dissenting). *See also* LaFave, *supra* §6.5(c), at 366 ("All members of the Court appear to agree that the mere seizure of the premises and contents . . . is permissible on probable cause even absent exigent circumstances.").[7]

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[7] Lower courts have also interpreted *Segura* as authorizing impoundment that is either entirely external or involves only a limited entry for purposes of securing the premises. *United States v. Riley*, 968 F.2d 422, 425 n. 5 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992); *United States v. Scheets*, 188 F.3d 829, 840 (7th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 837 (2000); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997); *United States v. Crespo De Lano*, 838 F.2d 1006, 1016 (9th Cir. 1987); *United States v. Morales*, 868 F.2d 1562, 1575 n. 8 (11th Cir. 1989); *United States v. Hall*, 50 M.J. 247, 250-51 (C.M.A. 1999); *People v. Griffin*, 727 P.2d 55, 59 (Colo. 1986); *State v. Hull*, 210 Conn. 481, 497, 556 A.2d 154, 163 (1989); *Jones v. State*, 648 So. 2d 669, 676 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995); *Commonwealth v. Blake*, 604 Mass. 823, 829-30, 604 N.E.2d 1289, 1294 (1992); *State v. Alayon*, 459 N.W.2d 325, 329-30 (Minn. 1990), *cert. denied*, 498 U.S. 1049 (1991); *State v. DeLane*, 207 N.J. Super. 45, 50, 503 A.2d 903, 905 (App. Div.

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The assumptions made in *Segura* are consistent with those made in other cases in which the Court, while criticizing warrantless entries made to preserve evidence, has commented favorably on the power of police officers to take the lesser step of seizing pending the securing of a warrant. In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court struck down the warrantless search of a murder suspect's apartment. In rejecting a claim of exigent circumstances amounting to the possible loss, destruction or removal of evidence, the Court found that possibility effectively "minimized" by "the police guard at the apartment." 437 U.S. at 394. The Court rejected a similar exigency argument in *Vale v. Louisiana*, 399 U.S. 30 (1970), in part because "the arresting officers [had] satisfied themselves that no one else was in the house." 399 U.S. at 34. That conclusion suggests that, once the officers had made that determination, they had the power to maintain that state of affairs while seeking the warrant that they needed. *See also Jeffers*, 342 U.S. at 52 ("In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door."); *Trupiano v. United States*, 334 U.S. 699, 706 (1948). In the instant case, Officer Love was the very "police guard" at the door that the Court has contemplated.

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[7] (...continued)
1986); *State v. Knight*, 340 N.C. 531, 548-49, 459 S.E.2d 481, 492 (1995); *State v. Smith*, 458 N.W.2d 779, 782 (S.D. 1990); *State v. Kin Ng*, 104 Wash. 2d 763, 770-71, 713 P.2d 63, 67 (1985).

While the Court has distinguished between property and places where warrantless *searches* are concerned, *Chambers*, 399 U.S. at 48, such a distinction is misplaced where only the *seizure* of a place, without entry, is at issue. When they can do so without invading a privacy interest, police officers are entitled to secure a place in order to prevent the destruction or other loss of evidence. The non-intrusive nature of a seizure, as compared to a search, excuses the requirement of a warrant so long as that seizure is confined to a reasonable period necessary for securing one. *See Segura*, 468 U.S. at 809-10 (Opinion of Burger, C.J., joined by O'Connor, J.). As Dean Griswold noted, "[u]nless there is some kind of a power to prevent removal of material from the premises, or destruction of material during this time, the search warrant will almost inevitably be fruitless." Griswold, *supra* n. 4, at 317. Indeed, cases like *Mincey*, *Jeffers* and even *Vale* demonstrate that, where privacy interests are at stake, securing a residence from the outside is the preferable alternative to a search. Impoundment addresses legitimate (and in this case decisive) concerns regarding loss of evidence without the need for intrusion.

By securing Respondent's home from the outside and sending his partner off to seek a search warrant, Officer Love was able to vindicate the State's interest in preventing Respondent from destroying the evidence hidden there without invading the sanctity of his home and thus perpetrating what has been considered the greater evil.[8]

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[8] Officer Love's brief entries to observe Respondent as he made telephone calls and retrieved his cigarettes do not alter this analysis, as will be discussed *infra* p. 22-24.

Indeed, to prohibit this procedure would limit officers who have "every reason to believe that someone in the house [is] likely to destroy the contraband if the search were postponed," *Vale*, 399 U.S. at 41 (Black, J. dissenting), to choosing between conducting a warrantless search and standing by while evidence is altered or destroyed. One likely result of rejecting impoundment would therefore be the creation of additional incentives for warrantless searches; "a rule intended to maximize security of premises may have the opposite effect upon security of the person." LaFave, *supra* §6.5(c), at 361; *see also People v. Bennett*, 17 Cal. 4th 373, 387-88, 949 P.2d 947, 956-57 (1998). In the appropriate case, external impoundment provides a middle ground that accommodates a policeman's investigative interest at a lesser cost to the rights of the individual.[9]

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[9] This Court should resist the suggestion of several commentators that an officer contributes to the need to secure a place by seeking Respondent's consent to search it. *See, e.g.*, Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 Hastings L.J. 283, 330-31 (1988); Note, *The Securing of the Premises Exception: A Search for the Proper Balance*, 38 Vand. L. Rev. 1589, 1616 (1985). It is not likely that Officer Love's knock on Respondent's door actually informed Respondent of his presence; the officers would not have made useful "peace-keepers" unless Respondent knew of their presence as soon as they arrived. In any event, immediate warrantless action can be justified by the need to prevent destruction of evidence even when that need is brought on by the seeking of consent to obtain it. *Cupp v. Murphy*, 412 U.S. 291 (1973). Once the suspect in that case had been "alerted to the desire of the police" to obtain consent, "there was no way to preserve the

(continued...)

C. Because Officer Love Was Entitled to Bar Respondent from Entering His Trailer Unless Escorted, the Officer's Observation of Respondent Inside the Trailer Was a Consensual Acceptance of That Condition.

On at least two occasions while they waited for the warrant, Officer Love permitted Respondent to enter the trailer while under his observation. Each time Officer Love stood in the doorway of the trailer and watched Respondent, but made no further entry or search. Jt. App. 17, 18, 22-23, 27, 30. The Appellate Court below determined that, by these entries, Officer Love had also "secured the dwelling from the inside," and concluded therefrom that the officer had executed a warrantless,

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[9] (...continued)
status quo while a warrant was sought, and there was good reason to believe that Murphy might attempt to alter the status quo unless he were prevented from doing so." 412 U.S. at 298 (Marshall, J., concurring).

The officers' ability to impound the trailer should not be lost because they first sought consent to search. Officer Love did not seek consent as a pretext to create the need to impound. Absent such a concern, this Court should not discourage the seeking of consent by requiring the police to risk their ability to preserve evidence if it is refused. While warrant searches are generally preferable to those conducted without a warrant, searches by voluntary and knowing consent are better still; they take less time and do not consume judicial resources. *Cf. Schneckloth v. Bustamante*, 412 U.S. 218, 228, 243 (1973). Informal investigative procedures are necessarily widely used and can be more effective and efficient than the invocation of judicial process. They may also be preferred by individuals who would rather abide an immediate and informal search than await a court order.

and therefore illegal, search of the trailer. The court distinguished *Segura* on the ground that Respondent in this case was not under arrest during the time his trailer was secured, and therefore was present and in a position to exercise some dominion over the trailer. Pet. App. 12-13.

As noted *supra* p. 12, the real consequence of these brief and cabined entries was to lessen the intrusion upon Respondent's Fourth Amendment interests by actually *permitting* him to continue to exercise some possessory rights in his residence. Because Officer Love was entitled to secure the residence as he did in order to prevent the destruction of evidence, as discussed above, he was entitled to bar Respondent's entry. Respondent's decision to accept Officer Love's conditions was therefore voluntary on his part, and the officer's presence in the doorway was consensual. In fact, Officer Love's terms essentially empowered both the officer and Respondent. Officer Love was entitled to keep Respondent out of the trailer entirely; similarly, had Respondent desired to prevent Officer Love from entering, he could have done so by simply staying outside himself.

The Appellate Court's reasoning, if followed to its logical conclusion, suggests that arresting Respondent would have lessened his possessory interest by making him unavailable to exercise it. *See also Segura*, 486 U.S. at 813 (Opinion of Burger, C.J., joined by O'Connor, J.); *but see id.* at 826-27 (Stevens, J. dissenting). It is difficult to understand how the additional personal infringement attendant to an arrest would have reduced Respondent's possessory interest. In any event, it is unlikely that Respondent would have preferred that alternative. In addition, Officer Love observed nothing of any conse-

quence, and certainly nothing inculpatory, as a result of these looks inside; these entries, even if illegal, cannot therefore be said to have "contribute[d] in any way to discovery of the evidence seized under the warrant." *Segura*, 468 U.S. at 815.

CONCLUSION

The judgment of the Appellate Court of Illinois should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-1132

In The Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

CHARLES McARTHUR,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether securing a home to prevent the destruction of evidence of a petty offense or misdemeanor is unreasonable under the Fourth Amendment when the police do so by barring the home's owners from entry, and entering into the home without a warrant in order to observe the owner's actions inside.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i.
TABLE OF CONTENTS	ii.
TABLE OF AUTHORITIES	iii.
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. WHETHER THE OFFICERS' SECURING OF MR. MCARTHUR'S HOME EXTERNALLY AND BY ENTERING INSIDE DESPITE BEING DENIED PERMISSION TO SEARCH VIOLATED THE FOURTH AMENDMENT	4
A. Whether Mr. McArthur's Home and Person Were Seized	7
1. Seizure of property	8
2. Seizure of a person	13
B. Whether a Warrantless Entry and Search Occurred	14
1. Exigent circumstances	16
2. Consent to entry	21
II. THIS COURT SHOULD BAR SEIZURES OF AND WARRANTLESS ENTRIES INTO HOMES TO PRESERVE EVIDENCE IN CASES WHERE MISDEMEANOR OFFENSES ARE INVOLVED	25
III. THE POLICE OFFICERS' VIOLATION OF THE FOURTH AMENDMENT WARRANTS EXCLUSION OF THE EVIDENCE OF MR. 68	
CONCLUSION	40

TABLE OF AUTHORITIES

Cases	*Page(s)*
Argersinger v. Hamlin, 407 U.S. 25 (1972)	34
Arizona v. Hicks, 480 U.S. 321 (1987)	9, 40
Arkansas v. Sanders, 442, U.S. 753 (1979)	5, 15
Bumper v. North Carolina, 391 U.S. 543 (1968)	22
Commonwealth v. DiSanto, 8 Mass. App. Ct. 694, 397 N.E.2d 672 (1979)	27
Commonwealth v. Hamilton, 24 Mass. App. Ct. 290, 508 N.E.2d 870, *rev. denied*, 400 Mass. 1104, 511 N.E.2d 620 (1987)	17, 18
Conway v. Pasadena Humane Society, 48 Cal. App. 4th. 163, 52 Cal. Rptr. 2d 777 (1996)	27
Coolidge v. New Hampshire 403 U.S. 443 (1971)	16
Delaware v. Prouse, 440 U.S.648, 654 (1979)	8

Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) 26

Dunaway v. New York, 442 U.S. 200 (1979) 29

Duncan v. Louisiana, 391 U.S. 145 (1968) 34

Florida v. Royer, 460 U.S. 491 (1983) 6

Gouled v. United States, 255 U.S. 298 (1921) 5

Hawaii v. Dorson, 61 Haw. 326, 615 P.2d 740 (1980) 24

Johnson v. United States, 333 U.S. 10 (1948) 5, 16, 22

Jones v. State, 648 So. 2d 669 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995) 28

Llaguno v. Mingey, 763 F2d. 1560 (7th Cir. 1985) 27

Mapp v. Ohio, 367 U.S. 643, 656 (1961) 37

McDonald v. United States, 335 U.S. 451 (1948) 6, 18, 26

Miller v. United States, 357 U.S. 301 (1958) . 15

Mincey v. Arizona, 437 U.S. 385 (1978) 6

Olmstead v. United States, 277 U.S. 438 (1928) 38

Payton v. New York, 445 U.S. 573 (1980) 15, 16, 27, 32, 35

People v. Griffin, 727 P.2d 55 (Colo. 1986) 28

People v. Lukach, 263 Ill. App. 3d 318, 635 N.E.2d 1053 (2nd Dist. 1994) 12

People v. McArthur, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999) 7, 10

People v. Miller, 773 P.2d 1053 (Colo. 1989) 27

People v. Odom, 83 Ill. App. 3d 1022, 404 N.E.2d 997 (3rd Dist. 1980) 12

People v. Palanza, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (3rd Dist. 1978) 12

People v. Payne, 239 Ill. App. 3d 698 N.E.2d 375 (5th Dist. 1997) 12

People v. Reinhardt, 141 Mich. App. 173, 366 N.W.2d 601 (1986) 27

People v. Smith, 7 Cal. 3d 282, 10 Cal. Rptr. 893, 496 P.2d 1261 (1972) 17

People v. Wahlens, 111 Ill. App. 3d 194, 443 N.E.2d 728 (4th Dist. 1982) 22

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 16, 22

Segura v. United States, 468 U.S. 796 (1984) 9, 10, 11, 14, 37, 38

State v. Alayon, 459 N.W.2d 325 (Minn. 1990), *cert. denied*, 498 U.S. 109 (1991) 28

State v. Bennett, 295 N.W. 2d 5 (S.D. 1980) 27

State v. Canby, 162 W. Va. 666, 252 S.E.2d 164 (1979) 27, 33

State v. Clark, 218 Kan. 726, 544 P.2d 1372, *cert. denied*, 426 U.S. 939 (1976) 27

State v. DeLane, 207 N.J. Super. 45, 503 A.2d 903 (1986) 28

State v. Guertin, 190 Conn. 440, 461 A.2d 963 (1983) 27, 32, 33

State v. Hull, 210 Conn. 481, 556 A.2d 154 (1989) 28

State v. Kin Ng, 104 Wash. 2d 763, 713 P.2d 63 (1985) 28

State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995) 28

State v. Ramirez, 49 Wash. App. 814, 746 P.2d 344 (1987) 27

State v. Smith, 458 N.W.2d 779 (S.D. 1990) .. 28

State v. Storvick, 428 N.W.2d 55 (Minn. 1988) 27

Steagald v. United States, 451 U.S. 204, 215 (1981) 32

Tennessee v. Garner, 471 U.S. 1 (1985) 33, 34

Terry v. Ohio, 392 U.S. 1 (1968) 6, 9, 16, 25

Texas v. Brown, 460 U.S. 730 (1983) 6, 8

United States v. Aquino, 836 F.2d 1268 (10th Cir. 1988) 17, 27

United States v. Baldacchino, 762 F.2d 175 (1st Cir. 1985) 27

United States v. Cattouse, 846 F.2d 144 (2d Cir.) *cert. denied* 488 U.S. 929 (1988) 27

United States v. Crespo DeLano, 838 F.2d 1006 (9th Cir. 1987) 28

United States vs. Davis, 423 F.2d 974 (5th Cir.), *cert. denied*, 400 U.S. 838 (1970) 17

United States v. Diaz, 814 F.2d 454 (7th Cir. 1987) 27

United States v. Driver, 776 F.2d 807 (9th Cir. 1985) 17

United States v. Jacobsen, 446 U.S. 109 (1984) 9

United States v. Karo, 468 U.S. 705 (1984) 6, 16

United States v. Korman, 614 F.2d 541 (6th Cir. 1981) 38

United States v. Leon, 468 U.S. 897 (1984) 31

United States v. Martinez-Gonzalez, 686 F.2d 93 (2d Cir. 1982) 27

United States v. Morales, 868 F.2d 1562 (11th Cir. 1989) 29

United States v. Munoz-Guerra 788 F.2d 295 (5th Cir. 1986) 18

United States v. Perez, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) 17

United States v. Place, 462 U.S. 696 (1983) 9

United States v. Riley, 968 F.2d 422, 425 n.5 (5th Cir.) 28

United States v. Roby, 122 F.3d 1120 (8th Cir. 1997) 28

United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974) 20

United States v. Rubin, 474 F.2d 262 (3d Cir. 1973) 27

United States v. Scheets, 188 F.3d 829 (7th Cir. 1999), *cert. denied*, U.S., 120 S. Ct. 837 (2000) 29

United States v. Socey, 846 F.2d 1439 (D.C. Cir.) *cert. denied*, 488 U.S. 858 (1988) 27

United States v. Thompson, 700 F.2d 944 (5th Cir. 1983) 18

United States v. United States District Court, 407 U.S. 297 (1972) 5, 14

United States v. Watson, 423 U.S. 411 (1976) 36

United States v. Whaley, 779 F.2d 585 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987) 6

Vale v. Louisiana, 399 U.S. 30 (1970) 17

Welsh v. Wisconsin, 466 U. S. 740 (1984) 14, 16, 17, 18, 19, 20, 25, 26

Wong Sun v. United States, 371 U.S. 471 (1963) 38

Youtz v. State, 494 So. 2d 189 (Ala. Ct. App. 1986) 17, 27

Statutory Provisions

720 ILCS 5/16-10 35
720 ILCS 5/28-1 35
730 ILCS 5-8-3 3
730 ILCS 5-9-1 3
735 ILCS 5/16-1 35

Other

3 W. LaFave, *Search and Seizure* (3d ed. 1996) 10, 11, 14, 29, 38

W. LaFave & A. Scott, *Criminal Law* (1972) 33

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SUMMARY OF ARGUMENT

In this case, the police effected the two-hour impoundment of Mr. McArthur's home in order to preserve evidence of two misdemeanor crimes while a search warrant was being obtained. The impoundment of Mr. McArthur's home was accomplished by preventing his entry inside, and through warrantless entries to observe his actions when he went inside to make phone calls and obtain cigarettes. There were no exigent circumstances justifying the officers' actions. The 2.3 grams of marijuana, one hitter and pipe were not in imminent danger of destruction. In fact, even though he was aware of the police presence outside, Mr. McArthur made no effort to get rid of the contraband until the police informed him that they wanted to search his home. Furthermore, no consent was obtained for the officer's entries.

A three-part analysis should be applied in determining whether the officers' actions violated Mr. McArthur's Fourth Amendment rights. First, this Court should determine whether a seizure occurred. The parties do not dispute that the officers seized Mr. McArthur's home. The parties also agree that a seizure of his person did not occur. Because the parties concur that a seizure of Mr. McArthur's home took place, this Court should compare the interests of the State versus Mr. McArthur in deciding whether it was reasonable under the circumstances. In striking this balance, this Court should compare the State's interests in prosecuting Mr. McArthur for two misdemeanor offenses to the invasion of Mr. McArthur's possessory interests in his home.

Second, this Court should consider whether a warrantless search was made in effecting the impoundment of Mr. McArthur's home. If so, this Court must likewise determine

whether the search was reasonable by comparing the State's interests against Mr. McArthur's. The third step in this Court's analysis is to determine if the officers acted illegally, then the Court must decide whether the evidence seized as a result of this conduct should be excluded.

In applying the Fourth Amendment's balancing test to an impoundment of the home, the seriousness of the offense should be a decisive factor. This Court has considered the seriousness of the offense when deciding other constitutional issues, including the constitutionality of warrantless entries to preserve evidence. Thus, it is logical that it would likewise be a consideration in impoundment cases.

Impoundment of a home by preventing its owner from entering and by warrantless entries inside is not always unreasonable under the Fourth Amendment's balancing test. If a felony or serious offense is involved, such an impoundment may be permissible providing it is justified by exigent circumstances. However, this Court should announce a bright line rule that the State's interest does not outweigh the citizen's Fourth Amendment rights to be free from warrantless entries and seizures when the State seeks to secure evidence of a misdemeanor or petty offense by impoundment of the home. In order to enforce that rule, evidence obtained by such means should be excluded even it if is ultimately found by virtue of a search warrant.

In this case, at stake was the police's ability to recover 2.3 grams of marijuana, a one hitter and pipe versus Mr. McArthur's privacy and possessory interests in his home. Had these items not been suppressed, the State would have been able to prosecute Mr. McArthur for two misdemeanor offenses. Given the fact that minor offenses were at issue, the State's

interests did not outweigh the invasion of Mr. McArthur's Fourth Amendment possessory and privacy rights in his home. Therefore, the decision of the Illinois Appellate Court should be affirmed.

ARGUMENT

In this case, the police knocked on Mr. McArthur's door and asked for permission to search inside because they believed he had contraband. When he refused their entry, they seized Mr. McArthur's home while a search warrant was obtained. The police prevented Mr. McArthur or anyone else he invited over from entering unless the police escorted them inside. Before the search warrant was obtained, Mr. McArthur went inside his home to make phone calls and obtain cigarettes and was accompanied by Officer Love despite Officer Love being denied permission to enter. (Jt. App. 27-28). Mr. McArthur admitted that if he had been permitted to enter alone, he would have destroyed the 2.3 grams of marijuana. It is also reasonably inferred from the record that if the police had not asked to search, Mr. McArthur would not have thought of destroying the 2.3 grams of marijuana and paraphernalia because the contraband had remained intact inside his home the entire time the police waited outside while Mrs. McArthur moved her possessions out.

Here, the offenses at issue were a Class A misdemeanor punishable by less than one year in jail and up to $2,500 in fines; and a Class C misdemeanor carrying a possible term of not more than 30 days and up to $1,500 in fines. 730 ILCS 5/5-8-3; 730 ILCS 5-9-1. As demonstrated by the possible penalties, the criminal activity afoot inside Mr. McArthur's home did not justify the 2-½ hour intrusion on Mr. McArthur's possessory interests in his home, and the warrantless entries inside.

The Illinois Appellate Court found that the trial court had not abused its discretion in concluding that Mr. McArthur's Fourth Amendment rights were violated despite the fact that he was committing a crime because the officers were not justified in seizing Mr. McArthur's home. Mr. McArthur respectfully requests that this Court affirm that ruling.

I. WHETHER THE OFFICERS' SECURING OF MR. MCARTHUR'S HOME EXTERNALLY AND BY ENTERING INSIDE DESPITE BEING DENIED PERMISSION TO SEARCH VIOLATED THE FOURTH AMENDMENT

This Court must determine whether a seizure and search of Mr. McArthur's home, and a seizure of his person occurred during the impoundment. If it answers any of those questions in the affirmative, then the Court must decide whether the State's actions were reasonable under the circumstances. The State contends that the police should be able to "maintain the status quo" by prohibiting entry into a residence by its unarrested occupants while a search warrant is being obtained in order to prevent the destruction of evidence. This Court should keep in mind that this scenario is not what occurred in Mr. McArthur's case. Rather, the police likely ordered Mr. McArthur outside of his home,[1] and also entered inside without a warrant to watch Mr. McArthur's activities. Thus, contrary to the State's assertion, Officer Love effected both a seizure and a search of Mr. McArthur's home during the impoundment. Accordingly, Mr. McArthur's possessory and privacy rights were affected.

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[1] Officer Love could not recall whether he instructed Mr. McArthur to come outside or if Mr. McArthur walked out on his own. (Jt. App. 17).

The law interpreting the Fourth Amendment is greatly concerned with police activities that infringe upon the sanctity and privacy of the home. As outlined below, this Court should find that the State's interests in preserving the evidence of Mr. McArthur's misdemeanor offenses do not outweigh Mr. McArthur's possessory and privacy rights in his home.

The Fourth Amendment protects the privacy and security of persons by guaranteeing:

> '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The prominent place the warrant requirement is given in our decisions reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.'

Arkansas v. Sanders, 442 U.S. 753, 759 (1979)(quoting *United States v. United States District Court*, 407 U.S. 297, 317 (1972)). Privacy interests are also furthered, "[b]y requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Sanders*, 442 U.S. at 759(quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Furthermore, the Fourth Amendment is to "receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." *Gouled v. United States*, 255

U.S. 298, 304 (1921).

The Fourth Amendment's rule of reasonableness governs seizures of people and property. *Texas v. Brown*, 460 U.S. 730, 739 (1983). It is the State's burden to demonstrate the justifiability of a seizure it seeks to uphold. See cf. *Florida v. Royer*, 460 U.S. 491, 501 (1983). Furthermore, an officer's good or bad faith in performing a seizure is irrelevant to a determination of its constitutional reasonableness. See e.g. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

The protection afforded by the Fourth Amendment against unreasonable searches and seizures applies to the innocent and guilty alike. *McDonald v. United States*, 335 U.S. 451, 453 (1948). Courts have agreed that a person's expectations of privacy in his home are not reduced simply because he is committing a crime or has evidence of a crime hidden therein. See e.g., *Mincey v. Arizona*, 437 U.S. 385, 391 (1978); *United States v. Whaley*, 779 F.2d 585, 591 n.8 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987). As this Court has observed, to conclude otherwise "would convict the suspect even before the evidence against him was gathered." *Mincey*, 437 U.S. at 391. Accordingly, although Mr. McArthur was committing Class A and Class C misdemeanors at the time the officers seized his home and made warrantless entries inside, he was no less entitled to the protections of the Fourth Amendment than any other citizen. *United States v. Karo*, 468 U.S. 705, 717 (1984).

Therefore, the actions of Officers Love and Skidis are to be balanced against the intrusions into Mr. McArthur's privacy and security in light of the State of Illinois' interests in prosecuting him for the Class A misdemeanor of possession of drug paraphernalia and the Class C misdemeanor of possession of less than 2.5 grams of marijuana. The State contends that the

balance falls in favor of the State's interests at the cost of the limited Fourth Amendment intrusion created by Mr. McArthur being denied access to his home. However, Mr. McArthur was not merely denied the right to enter his home. Rather, Mr. McArthur's home was seized and the officers made warrantless entries into his home.

A. Whether Mr. McArthur's Home and Person Were Seized.

Clearly, the officers' conduct in preventing Mr. McArthur from entering his home without a police escort must be judged under the Fourth Amendment. Here, Mr. McArthur was forbidden to step inside of his home as soon as he came outside and denied the police permission to search it. (Jt. App. 17, 26-27). Officer Love could not recall whether he ordered Mr. McArthur to step outside or whether Mr. McArthur walked outside on his own. (Jt. App. 17). Once outside, he was forbidden to reenter his home alone, even though Mr. McArthur asked for permission to do so. (Jt. App. 26-27). When Mr. McArthur went inside to call his mother and sister, Officer Love stepped inside the door and kept his eyes on Mr. McArthur. After Mr. McArthur completed the calls, he had to leave his home again. Furthermore, Mr. McArthur was told that no one else could come inside his home unless the police also entered. (Jt. App. 17-18). Under these circumstances, the Illinois Appellate Court correctly found that Mr. McArthur's home was seized within the meaning of the Fourth Amendment, and appropriately pondered whether his person was seized.[2]

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[2] The Illinois Appellate Court was "unclear" whether Mr. McArthur's person was seized. *People v. McArthur*, 304 Ill. App. 3d 395, 403, 713, N.E.2d 93, 98 (4th Dist. 1999).

1. Seizure of Property

The State concedes only that Mr. McArthur's home was seized. (Pet. Brief, at 7). The State and *amicus* contend that the State's interests in securing evidence against destruction outweighed the lesser Fourth Amendment interests of Mr. McArthur in having the freedom to enter his home unaccompanied by the police. The State asserts that the infringement on Mr. McArthur's possessory interests was mitigated by the fact that he could reenter his home under police observation. (Pet. Brief, at 12). Furthermore, the State claims that the two-hour dispossession of Mr. McArthur's home was an eminently reasonable time in which to obtain a search warrant. (Pet. Brief, at 12).

The State's argument should be rejected because the conduct cannot be judged in the context of a simple external seizure of Mr. McArthur's home. Rather, this Court must examine the totality of the impoundment process including the warrantless entries into Mr. McArthur's premises and the restraining of his person from going into his own home.

If the Court agrees that a seizure of Mr. McArthur's home occurred during the impoundment, then it must determine whether it was reasonable under the circumstances. In determining whether a particular course of action by the police violates a citizen's rights, this Court has ruled that an officer's action "is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." *Texas v. Brown*, 460 U.S. 730, 739 (1983)(quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). This Court has viewed the seizure of personal property as *per se* unreasonable unless it is done pursuant to a warrant issued upon probable cause and describing the items to be seized. *United*

States v. Place, 462 U.S. 696, 701 (1983); *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

The *Place* Court also noted that a seizure of personal property reasonable at its beginning may become unreasonable due to its duration or "if its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" *United States v. Jacobsen*, 466 U.S.109, 124 (1984); *Place*, 462 U.S. at 709-10. Although the *Place* court declined to adopt any time limitation for a permissible *Terry* type seizure of personal property, it found that the 90-minute detention of Place's luggage was "sufficient to render the seizure unreasonable." Id. at 710. Here, the seizure of Mr. McArthur's home lasted nearly two hours. (Jt. App. at 40). Thus, the seizure resulted in a significant deprivation of Mr. McArthur's possessory interests in his home.

The Illinois Appellate Court correctly found that the seizure of Mr. McArthur's home was unreasonable because no authority existed for such an action. In reaching that conclusion, the appellate court examined this Court's decision in *Segura v. United States*, 468 U.S. 796 (1984). In *Segura*, the police arrested the petitioner in the lobby of his apartment building and took him to his apartment. Four others were waiting in Segura's apartment and the police arrested them after viewing contraband in plain view and took all five into custody. Two agents waited inside Segura's apartment for nineteen hours until a search warrant was obtained. A subsequent search pursuant to the warrant yielded cocaine, ammunition, cash and records of narcotics transactions. Segura moved to suppress the evidence on the grounds that his apartment was illegally seized. In a 5-4 decision, the Court affirmed the petitioner's conviction on the grounds that any illegality in the initial entry would not require

suppression of the evidence because it had an independent source for its discovery.

However, in Part IV of the decision, joined in by Chief Justice Burger and Justice O'Connor, the Court stated that "securing a dwelling on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents" under the Fourth Amendment. *Segura*, 468 U.S. at 810 (Burger, C.J., joined by O'Connor, J.). The entire Court did not decide whether the agent's actions constituted a seizure of Segura's apartment because the nineteen-hour occupation of the apartment was not unreasonable under the totality of the circumstances. Moreover, the Court did not express an opinion on whether the impoundment of a home may "legitimately extend to limiting the freedom of movement of persons within, into or out of the impounded premises." *McArthur*, 304 Ill. App. 3d at 400, 713 N.E.2d at 96(quoting 3 W. LaFave, *Search and Seizure*, sec. 6.5(c), at 366 (3d ed. 1996)(hereinafter "LaFave")). The Illinois Appellate Court concluded that Mr. McArthur's case did not fall within the fact pattern of *Segura* or any of the three situations in which courts typically upheld the securing of a residence while seeking a search warrant. Thus, it held that the securing of and entering into Mr. McArthur's home without a warrant was unreasonable.

A comparison of the facts in *Segura* to Mr. McArthur's case reveal that the Illinois Appellate Court's holding was not against the manifest weight of the evidence. As observed by Prof. LaFave, "*Segura* . . . certainly has no bearing upon those instances in which the impoundment also involved some interference with the freedom of movement of those authorized to be at the premises." LaFave, at 371-72. Prof. LaFave reached this conclusion because the persons with a possessory interest

in Segura's apartment were in custody during the nineteen-hour occupation. LaFave, at 364. Here, Mr. McArthur was not in custody. Therefore, his freedom of movement with respect to entry into his home was restrained and the impoundment of his home certainly interfered with his possessory interests.

Furthermore, a comparison of the two cases demonstrates that *Segura* does not support the State's argument that the officers' actions constituted a minimum intrusion onto Mr. McArthur's Fourth Amendment rights because the State has conveniently overlooked the warrantless entries made into Mr. McArthur's home. Prof. LaFave states that the *Segura* majority did not really "approv[e] warrantless entry and impoundment even absent truly exigent circumstances, for the majority parses the police conduct in *Segura* into its 'seizure' and 'search' components, and with respect to the 'seizure' part is not really taking into account the fact of entry." LaFave, at 365. Prof. LaFave recognized that if the police enter the premises in order to secure evidence, "then there has been *both* a seizure and a search." LaFave, at 366 (emphasis in original)(citing *Segura*, 468 U.S. at 806, 827 (Burger, C.J., joined by O'Connor, J.; Stevens, J., dissenting)). All members of the *Segura* Court "appear to accept the proposition that a search (i.e. entry) of the premises to facilitate the impoundment requires *both* probable cause and exigent circumstances." LaFave, at 366 (emphasis in original).

Thus, what can be learned from *Segura* with respect to this case is that the seizure of and warrantless entries into Mr. McArthur's premises required both probable cause and exigent circumstances. Although probable cause existed for the issuance of the search warrant following the trial court's consideration of the affidavits and testimony prior to issuing the warrant, the same cannot be said with respect to the seizure and warrantless

entries into Mr. McArthur's home. (Jt. App. at 5-10; 31, 38). The Illinois Appellate Court incorrectly stated that Mr. McArthur did not dispute that probable cause existed for the securing of his home. (Pet. App. 12). Mr. McArthur did not concede this question before the trial or appellate courts; rather, his Brief focused on the illegality of the seizure. (Jt. App. at 31, 38; Defendant-Appellee Brief; Plaintiff-Appellant Brief, at 14). In fact in his motion to suppress, Mr. McArthur contended that the seizure amounted to an arrest without probable cause. (R. Vol. I, C40; Plaintiff-Appellant Brief, at 13-14).

Officer Love did not have probable cause to effect a search or seizure of Mr. McArthur's home. Probable cause exists when the totality of the facts and circumstances known to the officer would lead a reasonable, prudent person, standing in the shoes of the officer, to conclude that evidence of a crime will be discovered or that the property contains evidence of a crime. *People v. Lukach*, 263 Ill. App. 3d 318, 635 N.E.2d 1053 (2d Dist. 1994). When the police receive their information from a witness or informant that a suspect has contraband in his possession, it is generally required that the officer elicit some information demonstrating that the witness or informant is familiar with the appearance of the contraband before probable cause will be found to exist. See e.g. *People v. Payne*, 239 Ill. App. 3d 698, 607 N.E.2d 375 (5th Dist. 1997); *People v. Palanza*, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (3d Dist. 1978); *People v. Odom*, 83 Ill. App. 3d 1022, 404 N.E.2d 997 (3d Dist. 1980). Here, Mrs. McArthur did not tell Officer Love that she was familiar with what marijuana looked like, although she later stated that fact in her affidavit for a search warrant. (Jt. App. 9-10, 20). Thus, Officer Love did not have probable cause to seize Mr. McArthur's house or make warrantless entries inside. This conclusion is supported by Officer Love's own actions. He did not arrest Mr. McArthur until after the search warrant was

executed. (Jt. App. 23-24). Therefore, Officer Love did not even meet the first prong of the *Segura* test. Additionally, the State failed to prove the existence of exigent circumstances.

Probable cause did not exist for the seizure of Mr. McArthur's home. However, if this Court disagrees, then the Fourth Amendment's balancing test weighs in favor of Mr. McArthur. This Court should reject the State's attempt to balance its interests in prosecuting Mr. McArthur for two misdemeanor offenses solely against a two-hour external seizure of his home because that is not what occurred. Rather, the Court should balance the State's interests against the seizure of Mr. McArthur's home and the warrantless entries. Because the State's interest was in prosecuting Mr. McArthur for two misdemeanor offenses, the Court should find that the balance weighs in favor of protecting Mr. McArthur's possessory and privacy interests in his home.

2. Seizure of a person

The next question to be answered is whether Mr. McArthur's person was seized. The State asserts that Mr. McArthur was not seized because he was not under arrest, nor was he physically restrained because he could go anywhere he wanted except inside his home. (Pet. Brief at 13). The Illinois Appellate Court was "unclear" whether Officer Love's conduct amounted to a seizure of Mr. Mc Arthur. (Pet. App. at 13).

In this case, the police did not tell Mr. McArthur that he could leave, nor did they tell him he had to stay. (Jt. App. 29). Also, he was not placed in handcuffs or physically restrained in any fashion until after the search warrant was executed. (Jt. App. at 29). Certainly, Mr. McArthur's freedom of movement was restrained when it came to entering his home alone. The limited restriction of Mr. McArthur's movement was part of the

seizure of his home, not a seizure of his person.

B. Whether a Warrantless Entry and Search Occurred

Next, the Court should decide whether a warrantless search of Mr. McArthur's home occurred. The members of the *Segura* Court appear to agree that a warrantless entry into a home in order to effect an impoundment constitutes a search. LaFave, at 366 (citing *Segura*, 468 U.S. at 806, 827 (Burger, C.J., joined by O'Connor, J.; Stevens, J., dissenting). The State glosses over the fact that Officer Love made warrantless entries into Mr. McArthur's home in order to secure the evidence inside of two misdemeanor offenses. Officer Love did not merely stand in the doorway." (Pet. Brief at 4). According to his testimony, Officer Love admitted that he crossed the threshold, and stood by the doorway when Officer Love gave Mr. McArthur permission to enter his home and use the phone. (Jt. App. 18, 28). Officer Love did not need to go any further than the doorway to observe Mr. McArthur's actions because the phone was right by it. (Jt. App. 30). Apparently, since Officer Love's "brief entries yielded nothing incriminating", the State believes that both the Illinois Appellate Court, and this Court should overlook those warrantless entries.

This Court should reject the State's characterization of Officer Love's conduct and find that a warrantless search of Mr. McArthur's home occurred. If the Court agrees that a search occurred, it must then decide whether it was unreasonable under the circumstances.

"It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984)(quoting *United States v. United States District Court*,

407 U.S. 297, 313 (1972)). The overriding respect for the sanctity of the home has been embedded in our history since the beginning of the Republic:

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.'

Payton v. New York, 445 U.S. 573, 601 n.54 (1980) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590.

The mere reasonableness of the entry assessed in the light of the surrounding circumstances should not be a substitute for the judicial warrant required under the Fourth Amendment. See cf. *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979). As this Court has observed:

> 'The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement."

Id. at 759 (quoting *Coolidge v. New Hampshire* 403 U.S. 443, 481 (1971)).

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson*, 333 U.S. at 14. "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *United States v. Karo*, 468 U.S. 705, 714 (1984). There are only a few established exceptions to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Among these are the existence of exigent circumstances and consent to entry.

1. Exigent circumstances

"Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984); *Coolidge*, 403 U.S. at 455; *Payton v. New York*, 445 U.S. 573, 586 (1980). Police action undertaken without a warrant due to exigent circumstances must be "strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968). When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut. See cf. *Welsh*, 466 U.S. at 750.

Although the possible destruction of evidence is a commonly claimed exigency, this Court has not defined the

circumstances under which officers may make warrantless entries into homes to prevent the loss of evidence. However, *Vale v. Louisiana*, 399 U.S. 30, 35 (1970), implies that evidence must "be in the process of destruction" to qualify as an exigent circumstance justifying a warrantless entries. Additionally, the Circuit Courts of Appeal have consistently held that warrantless entries into private residences are not permissible on the grounds of fear that evidence was likely to be lost. Rather, a showing that destruction of evidence was imminent was required. See e.g. *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Davis*, 423 F.2d 974 (5th Cir.), *cert. denied*, 400 U.S. 838 (1970); *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988); *United States v. Driver*, 776 F.2d 807 (9th Cir. 1985). Several state courts have also agreed that exigent circumstances require more than a mere apprehension that evidence will be destroyed. *Youtz v. State*, 494 So. 2d 189 (Ala. Ct. App. 1986); *Commonwealth v. Hamilton*, 24 Mass. App. Ct. 290, 508 N.E.2d 870, *rev. denied*, 400 Mass. 1104, 511 N.E.2d 620 (1987).

Moreover, "even with probable cause to arrest, the destruction of evidence alone justifies a warrantless entry into the home only when the state interest in preventing the crime (as determined by the penalty imposed for violations) is sufficiently great." *United States v. Aquino*, 836 F.2d 1268, 1271 (10th Cir. 1988)(citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)). As one court has observed, the exigent circumstance of destruction of evidence exception to the warrant requirement "must not be permitted to swallow the rule: in the absence of showing of true necessity—that is an imminent and substantial threat to life, health or property—the constitutionally guaranteed right to privacy must prevail." *People v. Smith*, 7 Cal. 3d 282, 101 Cal. Rptr. 893, 895, 496 P.2d 1261, 1263 (1972). Furthermore, it is clear that the police cannot, through their

own conduct, create exigent circumstances justifying a warrantless entry where none otherwise existed. *United States v. Thompson*, 700 F.2d 944 (5th Cir. 1983); *United States v. Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986); *cf. McDonald v. United States*, 335 U.S. 451, 454-56 (1948); *Commonwealth v. Hamilton*, 24 Mass. App. Ct. 290, 508 N.E.2d 870, *rev. denied*, 400 Mass. 1104, 511 N.E.2d 620 (1987).

In this case, Officer Love admitted that he entered into Mr. McArthur's home despite being denied permission to search. (Jt. App. at 16-18). Therefore, the burden is on the State to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attached to Officer Love's entries. The State argues that the exigency of imminent destruction of evidence was present. However, there were no exigent circumstances justifying the warrantless entries into Mr. McArthur's home that were not created by the police officers themselves. Although Mr. McArthur was clearly aware of the police presence outside his home while his wife moved her things out, the 2.3 grams of marijuana, one hitter and pipe were not in "imminent" danger of destruction. Mr. McArthur did not make any attempt to destroy the 2.3 grams of marijuana or the drug paraphernalia until the police knocked on his door, told him that his wife had reported drugs inside, and asked if they could search. (Jt. App. 25-27). Thus, the police had no specific evidence of imminent destruction sufficient to satisfy the exception to the warrant requirement for Officer Love's entries into Mr. McArthur's home.

Moreover, assuming that the evidence of Mr. McArthur's misdemeanor offenses was in imminent danger of destruction, preserving the 2.3 grams of marijuana, one hitter and pipe did not justify the warrantless entries into Mr. McArthur's home in order to secure them. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

In *Welsh*, the petitioner was arrested following a warrantless entry into his home. The police had received reports that the petitioner had been driving erratically, swerved off the road into a field, then left his car and walked away from the scene. They gained entry into the petitioner's home when his stepdaughter answered the door and arrested petitioner for driving under the influence of an intoxicant. The petitioner was subjected to two proceedings: one was a civil violation under the Wisconsin vehicle code; and the other was based on a criminal charge of driving under the influence. The petitioner moved to dismiss the criminal complaint on the grounds that his arrest was illegal. The trial court denied his motion, the Wisconsin Court of Appeals reversed, and the Supreme Court of Wisconsin reversed the Court of Appeals. This Court in turn reversed the Wisconsin Supreme Court.

The *Welsh* Court stated that no exigency is created simply because there is probable cause to believe that a serious crime has been committed. "Moreover, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed." Id. at 753. The Court rejected the State's argument that the arrest was justified to preserve evidence of petitioner's blood alcohol level. It noted that petitioner was charged with a first offense for driving while intoxicated—a noncriminal, civil forfeiture offense without possibility of imprisonment. [3] This Court found that the State's interest in

[3] The petitioner was in fact charged with a criminal misdemeanor because he had received a previous citation for DUI; however, at the time the police entered his home they did not know about petitioner's previous conviction and therefore, it had to be presumed that the police were acting on a nonjailable traffic offense. *Welsh*, at 748 n. 6.

preserving evidence of petitioner's blood alcohol level did not qualify as exigent circumstances for the warrantless entry into the petitioner's home to arrest him.

Likewise, the State's interest in prosecuting Mr. McArthur for Class A and Class C misdemeanors did not qualify as exigent circumstances justifying Officer Love's warrantless entries into Mr. McArthur's home in view of the Fourth Amendment's overriding concern for the sanctity and privacy of the home. Furthermore, once Mrs. McArthur told the police about the marijuana and paraphernalia inside the trailer, the officers could have easily left with her without telling Mr. McArthur about the incriminating information, obtained a search warrant, and returned to retrieve the evidence and arrest Mr. McArthur. Thus, the evidence likely would have remained intact if the officers had left with Mrs. McArthur and complied with the warrant requirement.

The State argues that the police did not create the exigency by asking consent to search because that was part of an informal investigative procedure. (Pet. Brief at 22 n.9). This Court should reject that argument because the emergency that was created by the officer's request for consent was foreseeable. *United States v. Rosselli*, 506 F.2d 627 (7th Cir. 1974). As noted by the *Rosselli* court, "this type of situation may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded." Id. at 630. The police could simply ask for consent and when it is denied, the officers could nonetheless enter into the home on the grounds that the evidence will be destroyed if quick action isn't taken to preserve it.

In this case, the Illinois Appellate Court correctly found that no exigency existed for Officer Love's warrantless entries into Mr. McArthur's home. Any exigency concerning the destruction of evidence was created by the officers themselves once they informed Mr. McArthur that they believed he had marijuana inside. As noted above, a ruling that this type of conduct does not contribute to the creation of the exigency of destruction of evidence will result in officers being able to create such exigencies at will and by-pass the warrant requirement, especially in narcotics cases since drugs are easily destroyed.

2. Consent to entry

The State also contends that because Officer Love was entitled to prevent Mr. McArthur from entering his home without a police escort, Mr. McArthur consented to Officer Love's entries when he wanted to go inside to obtain cigarettes and use the phone. (Pet. Brief, at 22). Thus, the State concludes "Officer Love's terms essentially empowered both the officer and [Mr. McArthur]. Officer Love was entitled to keep [Mr. McArthur] out of the trailer entirely; similarly, had [Mr. McArthur] desired to prevent Officer Love from entering, he could have done so by simply staying outside himself." (Pet. Brief, at 23). The State argues that the real consequences of Officer Love's brief entries was to lessen the intrusion upon Mr. McArthur's possessory interests by permitting him to exercise some control over his own home. (Pet. Brief, at 23). The State also observes that Officer Love saw nothing of consequence as a result of his looks inside Mr. McArthur's trailer and therefore, his entries could not have contributed in any way to the discovery of the 2.3 grams of marijuana, one hitter and pipe.

Before the Illinois Appellate Court, the State did not argue that Mr. McArthur consented to Officer Love's entries. (Plaintiff-Appellant Brief). In fact, the State admitted that Mr. McArthur did not consent. (Plaintiff-Appellant Brief, at 21, 31). Therefore, this Court should deem that argument waived.

However, if this Court considers this issue, each of the State's arguments should be rejected. The State's first argument relies on a finding by this Court that Officer Love did not violate Mr. McArthur's Fourth Amendment rights by seizing his home and possibly seizing his person. In other words, the State is asking this Court to announce a rule that if the State does not illegally seize a home or its owner when it prevents him from entering inside, then he automatically consents for the police to enter his home without a warrant if the owner desires to enter to retrieve an important object, use the phone, or perhaps use the bathroom. This argument ignores the true meaning of "consent" to search. (Pet. Brief, at 22).

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court announced the standards to be applied in determining whether consent to a search is freely given by a person who is not in custody. When the State seeks to rely on consent to a search to justify its lawfulness, it bears the burden of proving that consent "'was, in fact, freely and voluntarily given.'" Id. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). In making this determination, courts should look to the totality of the circumstances to determine whether the consent was "coerced by threats or force, or granted only in submission to a claim of lawful authority". Id. at 233; See also *People v. Wahlen*, 111 Ill. App. 3d 194, 443 N.E.2d 728 (4th Dist. 1982).

In *Johnson v. United States*, 333 U.S. 10 (1948), the police received a tip from a confidential informant that someone

was smoking opium in the Europe Hotel. The officers went inside the hotel, recognized the smell of burning opium and knocked on the petitioner's door because that was the room from which the smell was coming. The police gained entry into the petitioner's hotel room when they knocked on the door, announced themselves as police officers, and the petitioner opened the door, "'stepped back acquiescently and admitted [them].'" Id. at 12. After entering the room, the police told the petitioner to consider herself under arrest and that they were going to search the room. The search turned up incriminating evidence.

This Court concluded that the search was unlawful. This Court observed that the entry into the petitioner's living quarters, which was the genesis of the search, "was demanded under color of office." Id. at 13. Accordingly, "[i]t was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." Id.

Here, Mr. McArthur expressly told Officer Love that he could not go inside his home without a warrant. (Jt. App. 28). Thus, Mr. McArthur did not voluntarily consent to Officer Love's entries. Likewise, Mr. McArthur did not give his implied consent by entering into his own home to make phone calls to his mother and sister, and to get cigarettes. Mr. McArthur was told that he could not go inside his home alone so that he could destroy evidence. (Jt. App. 21). Officer Love refused Mr. McArthur's requests to go inside alone to make his calls and retrieve his cigarettes. (Jt. App. 17-18). Clearly, Officer Love entered Mr. McArthur's home under color of office. Mr. McArthur's entries into his home accompanied by Officer Love was a submission to authority, not voluntary consent.

This Court should likewise reject the State's argument

that Officer Love's entries lessened the intrusion upon Mr. McArthur's possessory rights. Officer Love's entries constituted an even greater intrusion upon Mr. McArthur's Fourth Amendment rights. Although, Mr. McArthur was concealing evidence of two misdemeanor crimes, his expectation of privacy in his home was not diminished and he was nonetheless entitled to keep Officer Love outside until he had a warrant. Under the State's argument, Mr. McArthur's possessory rights could not be enjoyed without giving up his right to privacy in his own home. Given that the invasion of the home by the government is the chief evil at which the Fourth Amendment is directed, it is hard to imagine how the intrusion upon Mr. McArthur's rights were lessened by Officer Love's warrantless entries.

Finally, the Court should reject the State's assertion that since Officer Love did not see anything incriminating during his entries, they should not be considered illegal. In other words, the State is essentially asking this Court to issue a ruling of "no harm, no foul". This is not the standard for determining whether an impermissible warrantless entry occurred. See c.f. *Hawaii v. Dorson*, 62 Haw. 326, 615 P.2d 740 (1980). Furthermore, as argued below in the application of the exclusionary rule section, Officer Love's warrantless entries prevented Mr. McArthur from destroying his 2.3 grams of marijuana, one hitter and pipe. Thus, Officer Love's warrantless entries significantly contributed to the discovery of the evidence against Mr. McArthur. Accordingly, the State has not met its burden with respect to justifying Officer Love's warrantless entries into Mr. McArthur's home.

II. THIS COURT SHOULD BAR SEIZURES OF AND WARRANTLESS ENTRIES INTO HOMES TO PRESERVE EVIDENCE IN CASES WHERE MISDEMEANOR OFFENSES ARE INVOLVED

After this Court determines whether a search and seizure of Mr. McArthur's home took place during the impoundment procedure, it must decide whether those actions were reasonable. Because the Fourth Amendment represents an attempt to balance the government's interest in enforcing laws against individuals' privacy interests, its application to impoundment cases "should reflect an effort to look to 'the scope of the particular intrusion, in light of all the exigencies of the case'" including the seriousness of the offense. See cf. W. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations-Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439, 488-89 (1991)(hereinafter "Schroeder") (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

In *Welsh*, this Court explicitly held that the seriousness of the offense is relevant in determining whether the police violated the Fourth Amendment with respect to a warrantless entry into the home. The *Welsh* Court acknowledged that its holding that preserving evidence of minor offenses did not create exigent circumstances justifying warrantless entries was not a novel idea, quoting Justice Jackson's concurring opinion in *McDonald v. United States*, 335 U.S. 451 (1948):

> 'Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. . . . Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well

> as the hazards of the method of attempting to reach it.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime.... While the enterprise of parting fools from their money by the "numbers" lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant'

Welsh, 466 U. S. at 751 (quoting *McDonald,* 335 U.S. at 459-60 (Jackson, J. concurring)); see also *Payton v. New York*, 445 U.S. 573, 616-17 (1980) (White, J., dissenting). Thus, it is logical that this Court should continue to look at the nature of the underlying charge in determining whether a warrantless seizure and impoundment of the home from the outside, as well as a warrantless entry into it to secure evidence, violates the Fourth Amendment.

Taking their cue from *Welsh*, and its noted approval of *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) several state and federal courts have considered the seriousness of the offense alone or factored it in along with other matters in determining whether exigent circumstances exist justifying a

warrantless entry into the home. See e.g. *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987)(distribution of a controlled substance); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985)(pursuit of suspected murderer); *United States v. Baldacchino*, 762 F.2d 175 (1st Cir. 1985)(possession of narcotics with intent to distribute); *State v. Bennett*, 295 N.W.2d 5 (S.D. 1980)(distribution of a controlled substance); *State v. Canby*, 162 W. Va. 666, 252 S.E.2d 164 (1979)(multiple arsons); *Commonwealth v. DiSanto*, 8 Mass. App. Ct. 694, 397 N.E.2d 672 (1979)(armed robbery and attempted murder of two police detectives); *Conway v. Pasadena Humane Society*, 48 Cal. App. 4th 163, 52 Cal. Rptr. 2d 777 (1996)(entry to seize dog that was in violation of city ordinance); but see *United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973)(possession of 90lbs of hashish). More specifically, several state and federal courts have acknowledged that the seriousness of the offense is an important factor in deciding whether a warrantless entry into a home is permissible to prevent the destruction of evidence. See *State v. Guertin*, 190 Conn. 440, 461 A.2d 963 (1983)(sexual assault and burglary); *State v. Clark*, 218 Kan. 726, 544 P.2d 1372, *cert. denied*, 426 U.S. 939 (1976); *United States v. Socey*, 846 F.2d 1439 (D.C. Cir), *cert. denied*, 488 U.S. 858 (1988)(conspiracy to distribute narcotics); *United States v. Cattouse*, 846 F.2d 144 (2d Cir.), *cert. denied*, 488 U.S. 929 (1988)(conspiracy to distribute narcotics); *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988)(illegal possession of firearm); *United States v. Martinez-Gonzalez*, 686 F.2d 93 (2d Cir. 1982)(conspiracy to possess and distribute narcotics); *State v. Storvick*, 428 N.W.2d 55 (Minn. 1988)(vehicular homicide); *State v. Ramirez*, 49 Wash. App. 814, 746 P.2d 344 (1987)(possession of heroin and cocaine); *Youtz v. State*, 494 So. 2d 189 (Ala. Crim. App. 1986)(drug trafficking); *cf. People v. Reinhardt*, 141 Mich. App. 173, 366 N.W.2d 601 (1986)(misdemeanor offense); *People v. Miller*, 773 P.2d 1053

(Colo. 1989)(exigent circumstances did not exist for warrantless home entry when probable cause existed that defendant committed first degree sexual assault of minor).

These decisions indicate a trend for courts to uphold warrantless entries into private residences to prevent the destruction of evidence when relatively serious offenses are involved, and to find a Fourth Amendment violation when the warrantless entry occurred with respect to a minor offense. Even the cases cited by the State for the proposition that impoundment of the home to preserve evidence is constitutional involved serious offenses. See *State v. Alayon*, 459 N.W.2d 325 (Minn. 1990), *cert. denied*, 498 U.S. 109 (1991)(possession of cocaine with intent to distribute); *State v. Hull*, 210 Conn. 481, 556 A.2d 154 (1989)(impoundment of truck upheld in murder case); *State v. DeLane*, 207 N.J. Super. 45, 503 A.2d 903 (1986)(upheld posting guard outside residence in case of possession of controlled substance with intent to distribute, but no exigent circumstances existed for warrantless entry into home); *Jones v. State*, 648 So. 2d 669 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995)(police should have posted guard to secure evidence in murder case); *People v. Griffin*, 727 P.2d 55 (Colo. 1986)(possession with intent to distribute controlled substance); *State v. Knight*, 340 N.C. 531 , 459 S.E.2d 481 (1995)(first degree murder); *State v. Smith*, 458 N.W.2d 779 (S.D. 1990)(seizure of automobile to recover stolen property); *State v. Kin Ng*, 104 Wash. 2d 763, 713 P.2d 63 (1985)(murder); *United States v. Riley*, 968 F.2d 422, 425 n.5 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992)(possession of firearm by a felon); *United States v. Scheets*, 188 F.3d 829 (7th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 837 (2000)(defendant consented to search following bank robbery); *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997)(possession of a controlled substance with intent to deliver); *United States v. Crespo De Lano*, 838

F.2d 1006 (9th Cir. 1987)(possession of controlled substance with intent to deliver); *United States v. Morales*, 868 F.2d 1562 (11th Cir. 1989)(possession of a controlled substance with intent to deliver).

The question becomes how does the Court articulate a standard with respect to the seriousness of an offense for courts and police officers to readily apply in determining whether the seizure of and warrantless entry into the home when its occupants are present for the purpose of securing evidence is constitutionally permissible. This Court has recognized the need for easy to apply and familiar standards "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

Likewise, scholars have suggested guidelines for the establishment of bright line rules in Fourth Amendment areas where necessity dictates foregoing a case-by-case analysis. See e.g. Schroeder, at 557-59; W. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases"*, 85 Mich. L. Rev. 427, 452 (1986). Prof. LaFave has pondered whether a rule proscribing when warrantless entries are permissible "will be defined in a way which is understandable by police and which will not result in it being an exception which in effect swallows up the general rule that a warrant is needed to search premises." W. LaFave, *Search and Seizure*, sec. 6.5(b) at 342 (3d ed.1996). He suggests that bright line rules can be created when: 1) the proposed rule has clear and absolute boundaries; 2) if application of the rule obtains similar results to a case-by-case adjudication; and 3) if the rule cannot easily be manipulated or abused. W. LaFave, 85 Mich. L. Rev. at 452.

One commentator has suggested that the Court establish the line with respect to warrantless entries "to coincide with the line most jurisdictions use to distinguish misdemeanors from felonies." Schroeder, at 472. Professor Schroeder suggests:

> "If less than one year's imprisonment may be imposed for a particular offense, and most jurisdictions would therefore view that offense as a misdemeanor, warrantless entries for that offense should be barred. When only an ordinary felony is involved, the seriousness of the offense should be irrelevant to the decision to obtain a warrant. Instead, the permissibility of warrantless entries in ordinary felony cases should be determined solely by reference to the other factors that traditionally have been relevant to that question. These factors include the likely destruction of evidence, the danger of violence, and the prospect of the suspect's escape."

Schroeder, at 472. This test is in keeping with the reasonableness requirement of the Fourth Amendment, is easily used by the police and the judiciary, and respects the sanctity of the home.

Professor Schroeder also identifies eight advantages of a rule barring warrantless home entries directed against misdemeanants as follows: 1) a warrant requirement might discourage dangerous police activities; 2) review of the facts by a neutral magistrate will reduce the incidences of unjustified home entries; 3) the warrant requirement will prevent hindsight from influencing the evaluation of the reasonableness of a search since there will be a contemporaneous recordation of the basis for the search; 4) showing a warrant before entering reduces public perception of unlawful or intrusive police conduct and perhaps reduces the risk of resistance or violence; 5) because courts prefer warrants, more searches conducted pursuant to a

warrant might be upheld that would have otherwise been invalidated if conducted without a warrant; 6) "if the good faith exception announced in *United States v. Leon*, 468 U.S. 897 (1984), does not extend to warrantless activities, some activities pursuant to a warrant will be upheld while those same activities would be invalidated if conducted without a warrant"; 7) a warrant will protect officers against claims for damages brought by individuals contending that the entry was unconstitutional; and 8) a warrant requirement may enhance respect for the law as some people might be outraged if warrantless entries were permitted against minor offenders. Schroeder, at 541 [citations omitted].

Additionally, the felony/misdemeanor distinction comports with Prof. LaFave's suggestion for a bright line test. The felony/misdemeanor line has clear boundaries that are easily discerned and applied by officers and courts. Application of this distinction would achieve the same results within a state and similar results from state to state. Finally, the rule could not be easily manipulated or abused in cases, such as Mr. McArthur's where the police could have questioned Mrs. McArthur concerning the amount of marijuana she saw in her husband's home. In fact, in most of the cases cited above the officers had an idea about the seriousness of the offense at issue either through informants, undercover agents, or from visible or audible clues at the scene. Thus, the police should be able to readily ascertain at the scene whether they are dealing with a felony or misdemeanor offense.

Prof. Schroeder's test is also in keeping with this Court's pronouncements. The *Welsh* majority appears to have suggested categories of offenses indicating that the seriousness of the crime draws the line by which the police can enter a home without a warrant as follows: no warrantless entries are permissible for

"'extremely minor'" offenses and rarely permissible for "'minor'" crimes; and warrantless home entries are permissible under the "'usual'" circumstances for "'ordinary'" offenses and are allowed with "'special frequency'" for "'serious'" crimes. Schroeder, at 501. Moreover, "[t]he felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes." *Payton v. New York*, 445 U.S. 573, 617 (1980) (White, J., dissenting); see cf. *Steagald v. United States*, 451 U.S. 204, 215 (1981)(exceptions to the warrant requirement must not permit the "potential for abuse").

The state supreme courts of Connecticut and West Virginia have approved a substantially similar test in warrantless entry cases to that offered by Prof. Schroeder. In *State v. Guertin*, 190 Conn. 440, 461 A.2d 963 (1983), the Connecticut Supreme Court borrowed a test from the Supreme Court of Appeals from West Virginia to apply to determine the permissibility of warrantless home entries. *Guertin*, at 453, 461 A.2d at 970 (citing *State v. Canby*, 252 S.E.2d 164, 167 (W. Va. 1979)). This test could be modified for application to warrantless seizures of and entries into homes when their owners are present in order to secure evidence. The *Canby* test, originally formed as a test of exigent circumstances for the making of an arrest for a felony without a warrant, "is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others." *Guertin*, 190 Conn. at 453, 461 A.2d 963, 970. The *Canby* test is objective—"'its preeminent criterion is what a reasonable, well-trained police officer would believe, not what the arresting officer actually did

believe.'" *Guertin*, at 453, 461 A.2d at 970 (quoting *Canby*, 252 S.E.2d at 167.

The *Guertin* court observed that the *Canby* rule "had much to commend it." *Guertin*, at 453, 461 A.2d at 970. This rule is in keeping with the mandate of the Fourth Amendment by protecting the privacy of the home. Moreover, it narrowly and precisely draws an exception to the warrant requirement to "cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded." Id. Finally, the *Canby* rule "is clear enough so that . . . the police may know the limitations of their authority." Id.

Though not without some problems, the felony/misdemeanor line would provide a clear indication of the seriousness of an offense that is easily identifiable by the courts and officers faced with a decision to make a warrantless entry into a home or similarly protected dwelling. Schroeder, at 508, 533; W. LaFave & A. Scott, *Criminal Law*, sec. 6, at 26 (1972). Nearly every jurisdiction draws this distinction. Schroeder, at 508. Moreover, it is in keeping with the common law that held that a warrant was required for a misdemeanor arrest when not committed in the officer's presence, whereas a felony arrest could be made on the basis of probable cause. see cf. *Tennessee v. Garner*, 471 U.S. 1, 12 (1985)(Fourth Amendment to be construed in light of common law which distinguished between felons and misdemeanants when it came to using whatever force necessary to effect the arrest of a fleeing suspect). Additionally, the widespread use of the felony/misdemeanor distinction in other criminal settings demonstrates its usefulness in warrantless entry to secure evidence cases. Schroeder, at 510-13.

This Court has used the distinction between serious and petty offenses in determining whether the Constitution guarantees such rights as trial by jury or legal counsel. See e.g. *Duncan v. Louisianna*, 391 U.S. 145, 154-62 (1968); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); but see *Tennessee v. Garner*, 471 U.S. 1 (1985)(noting difficulty with the felony/misdemeanor distinction and focusing on the nature of the harm to be averted in determining whether deadly force warranted); see also Schroeder, at 513 n317. Similarly, several state and federal courts have utilized the seriousness of the offense in applying the reasonableness test in other Fourth Amendment settings. Schroeder, at 536 n. 445.

The State may contend that a rule barring warrantless seizures of and entries into homes for the purpose of securing evidence in misdemeanor cases will cause criminals to go free. Certainly, prohibiting warrantless entries in misdemeanor cases will result in some offenders escaping prosecution. However, as observed by Professor Schroeder:

> [I]t is difficult to view the inability to convict a few minor offenders as a significant cost. The vast majority of misdemeanors probably go unnoticed and unreported. Of those that are reported, the majority are never cleared by arrest, and many of those arrests do not lead to conviction. Most misdemeanor convictions do not lead to jail or to other substantial sentences.
>
> Even in the case of serious crimes, public safety is less threatened by a person who committed a past crime but who now is 'going about his lawful business than it is by a suspect who is currently in the process of violating the law.' In the case of misdemeanors the threat posed by past offenders is often insignificant. . . . Most

> minor offenders, however, will simply go about their lawful business whether or not they are apprehended. Moreover, even those minor offenders inclined to commit more crimes are unlikely to do significant damage during the brief delay in their apprehension caused by a warrant requirement. Under these circumstances, there are few compelling reasons, absent a present threat of violence, not to require that the police await a warrant before entering the home of a minor offender.

Schroeder, at 539 [citations omitted].

It is doubtful that society will suffer serious consequences if impoundments of homes, including warrantless entries to preserve evidence, are not allowed in misdemeanor cases such as neighbors playing nickel-dime poker in the living room (720 ILCS 5/28-1, Class A misdemeanor); or where a shoplifter has taken a pack of gum (735 ILCS 5/16-1, Class A misdemeanor); or where college students have obtained cable television for their apartment without paying for it (720 ILCS 5/16-10, Class A misdemeanor). Accordingly, this Court should view with skepticism arguments that effective law enforcement will suffer if a warrant requirement is imposed as a precondition to the securing of homes both inside and out when misdemeanor offenses are involved. See cf. *Payton v. New York*, 445 U.S. 573, 602 (1980).

Likewise, this Court should reject any argument that states will rush to increase penalties for petty offenses in order to circumvent a rule permitting the securing of evidence by impoundment only in felony cases. History demonstrates that states do not reclassify misdemeanor offenses as felonies in order to increase the number of crimes for which warrantless law

enforcement activities are permissible. Schroeder, at 517 (noting that there was no rush to reclassify or increase sentences for misdemeanor offenses in states that did not authorize by statute misdemeanor arrests for misdemeanors not committed in the presence of an officer following this Court's decision in *United States v. Watson*, 423 U.S. 411 (1976)). Moreover, other incentives exist in preventing states from reclassifying offenses including the greater expense naturally associated with prosecuting felony crimes such as jury trials, counsel for indigent defendants and jail space. Schroeder, at 517.

An analysis of the costs and benefits of a rule prohibiting seizures of the home and warrantless entries in order to preserve evidence in misdemeanor cases comports with the Fourth Amendment's reasonableness requirement as it reflects the balancing of competing interests. Accordingly, this Court should draw the line between constitutionally permissible and impermissible impoundment of homes from the inside and outside in order to secure evidence based on the seriousness of the offense.

In this case, such a balancing test reveals that the impoundment of Mr. McArthur's home and the warrantless entries by Officer Love violated the Fourth Amendment. As reflected by the possible sentences for both misdemeanors for which Mr. McArthur was charged, the State of Illinois did not have a great interest in protecting society at large from Mr. McArthur's activities within his own home. Moreover, under the eight factors cited above, the public's interest in prosecuting Mr. McArthur is outweighed by the advantages in requiring the police to obtain a warrant before impounding the home of a person suspected of committing a misdemeanor.

III. THE POLICE OFFICER'S VIOLATION OF THE FOURTH AMENDMENT WARRANTS EXCLUSION OF THE EVIDENCE OF MR. MCARTHUR'S MISDEMEANOR ACTIVITIES

Should this Court determine that Officer Love's actions violated the Fourth Amendment, then the Court must decide whether the evidence against Mr. McArthur should be suppressed. Generally, when police conduct violates the Fourth Amendment, then the exclusionary rule requires suppression of all evidence obtained as a result of that misconduct. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

The United States, as *amicus curiae*, contends that even if the officers' actions violated the Fourth Amendment, the evidence against Mr. McArthur should not have been suppressed because it was obtained pursuant to a valid warrant. Before the Illinois Appellate Court, Mr. McArthur contended that the State waived this argument by not presenting it before the trial court. (Defendant-Appellee's Brief, at 3). Mr. McArthur takes the same position before this Court. Petitioner has not even challenged this issue and an amicus party should not be allowed to circumvent the waiver rule.

However, as noted by Justice Stevens in his dissenting opinion in *Segura*, the evidence in issue would not have come to the State's attention if not for its illegal conduct. *Segura*, 468 U.S. at 832-35 (Stevens J., dissenting). In *Segura*, the majority stated that it would have been speculation to assume that the evidence against Segura would have been destroyed by his comrades if the apartment had not been occupied by the police. In this case, there is no doubt that but for Officer Love's actions, Mr. McArthur would have destroyed the 2.3 grams of marijuana, one hitter and pipe. Thus, there is clearly a causal

connection between the police's conduct and their ability to obtain the evidence against Mr. McArthur. *Wong Sun v. United States*, 371 U.S. 471 (1963).

The United States correctly observes that the *Segura* majority rejected the notion that the exclusionary rule should be applied in a manner essentially giving people a "constitutional right to destroy evidence." *Segura*, 468 U.S. at 816. However, if the Court chooses to address this issue, it should revisit its holding in *Segura* with respect to the facts of this case.

Here, application of the exclusionary rule is particularly important in two respects. First, it is in keeping with the rule's purpose. "Every time a court holds that unconstitutionally obtained evidence may not be used in a criminal trial it is acutely aware of the social costs that such a holding entails. Only the most compelling reason could justify the repeated imposition of such costs on society. That reason, of course, is to prevent violations of the Constitution from occurring." *Segura v. United States*, 468 U.S. 796, 827 (Stevens, J., dissenting)(citing *Olmstead v. United States*, 277 U.S. 438, 470 (1928)(Holmes, J., dissenting)). If the Court determines that the police actions taken in this case violate the Fourth Amendment, and does not exclude the evidence, then the State's conduct "remains an illegality only in the theoretical sense, undeterred by any realistic threat of exclusion." LaFave, at 367; see also *United States v. Korman*, 614 F.2d 541 (6th Cir, 1981)(Merritt J., dissenting). In other words, without application of the exclusionary rule, there is no incentive for the police not to seize a person's home and make a warrantless entry inside under the guise of preserving evidence when they know that others are in the process of securing a warrant, because the warrant will always bring the evidence within the protection of the independent source doctrine.

The second reason application of the exclusionary rule in this case is appropriate is because it strikes a balance between the *Segura* majority and dissenting views. As discussed above, if this Court announces a rule that securing evidence within a home by seizures and warrantless entries is illegal in misdemeanor cases only, then excluding such evidence will effectively deter such police conduct and ensure that such intrusions on protected Fourth Amendment rights occur only when the states' interests in prosecuting individuals, as determined by the states' classifications of crimes, are especially great. As long as the crime at issue is a felony, the evidence will be admissible providing another exigency existed for the states' actions.

CONCLUSION

For the reasons given above, the State's actions in seizing Mr. McArthur's home and making a warrantless entry inside was unreasonable under the Fourth Amendment when compared to the State's interests in prosecuting him for two misdemeanor offenses. Although a ruling affirming the Illinois Appellate Court's decision will result in Mr. McArthur and possibly other minor offenders escaping prosecution "there is nothing new in the realization the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). Accordingly, Mr. McArthur respectfully requests that the Illinois Appellate Court's decision be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Respondent's Possession of Marijuana and Paraphernalia Was Sufficiently Serious to Justify the External Impoundment of His Residence While a Search Warrant Was Sought 1

II. The Distinction Between Felonies and Misdemeanors Is Not Suited to Supporting a "Bright-line Rule" to Govern the Propriety of External Impoundment 3

III. Officer Love's Conduct Falls Within a Reasonable Rule Allowing External Impoundment of a Residence Based on Probable Cause While a Search Warrant Is Sought 7

IV. Suppression in this Case Would Disserve the Policies Behind the Exclusionary Rule by Penalizing an Officer's Deliberate Efforts to Honor a Defendant's Constitutional Rights 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases PAGE(S)

Argersinger v. Hamlin,
407 U.S. 25 (1972) 6

Berkemer v. McCarty,
468 U.S. 420 (1984) 5, 6

Bumper v. North Carolina,
391 U.S. 543 (1968) 10

Duncan v. Louisiana,
391 U.S. 145 (1968) 6

Johnson v. United States,
333 U.S. 10 (1948) 10

Miranda v. Arizona,
384 U.S. 436 (1966) 5

Murray v. United States,
487 U.S. 533 (1988) 13

Segura v. United States,
486 U.S. 796 (1984) 10, 11, 12

Steagald v. United States,
451 U.S. 204 (1981) 11

Tennessee v. Garner,
471 U.S. 1 (1985) 4

United States v. Karo,
468 U.S. 705 (1984) 11

United States v. Place,
462 U.S. 696 (1983) 9

Welsh v. Wisconsin,
466 U.S. 740 (1984) 2, 3, 5, 6, 7

Constitutional and Statutory Provisions

U.S. Const., amend. IV . . . . . *passim*

720 ILCS 5/11-9.1(a) 4

720 ILCS 5/12-2(a) 4

720 ILCS 5/12-3.1 4

720 ILCS 5/12-3.2 4

720 ILCS 5/12-15 4

720 ILCS 5/12-21.6 4

720 ILCS 5/24-1 4

720 ILCS 5/24-3.1 4

720 ILCS 5/31-1 4

720 ILCS 550/4(a) 5

720 ILCS 550/4(c) 6

720 ILCS 550/4(d) 5

720 ILCS 550/5 through 550/9 6

INTRODUCTION

Rather than address the heart of this case, Respondent instead focuses on its periphery. Seizing on several moments during which Officer Love stood in Respondent's doorway and watched him retrieve cigarettes and make telephone calls, Respondent would elevate these marginal events to the focal point of this case. His arguments, and those of *amici curiae* supporting him, treat this case as one that hangs on an illegal search, thereby practically ignoring the fact that the impoundment procedure carried out by Officer Love deliberately avoided the need for a warrantless search and limited the police officer's pre-warrant entries to brief, consensual and ultimately unincriminating observations.[1] The Court should resist Respondent's entreaties to let the tail wag the dog in this matter.

I. RESPONDENT'S POSSESSION OF MARIJUANA AND PARAPHERNALIA WAS SUFFICIENTLY SERIOUS TO JUSTIFY THE EXTERNAL IMPOUNDMENT OF HIS RESIDENCE WHILE A SEARCH WARRANT WAS SOUGHT.

Respondent contends that the misdemeanor offenses with which he was ultimately charged were not serious enough to justify Officer Love's actions. This claim is new to this case; it was never made in the trial or appellate court. In any event, it misapprehends this Court's pronouncements regarding the place that the nature of the offense occupies in the Fourth Amendment's balancing of interests.

---

[1] *See* Pet. Brief at 12, 22-24.

Respondent principally relies on *Welsh v. Wisconsin*, 466 U.S. 740 (1984), for the proposition that the marijuana and paraphernalia possession misdemeanors charged in this case lacked sufficient gravity. That case is distinguishable from the instant one in several critical respects. *Welsh* involved drunk driving, which was, under Wisconsin law, "a nonjailable traffic offense," 466 U.S. at 742.[2] By contrast, the offenses with which Respondent has been charged are criminal drug violations, for which sentences of incarceration may be imposed. *See* Pet. Brief at 5 n. 3. The attachment of criminal penalties to the possession of even a small quantity of marijuana, as well as to the possession of equipment for its consumption, suggests that Illinois takes such matters more seriously. In addition, *Welsh* involved a nighttime warrantless entry into a home to make an arrest of the occupant, 466 U.S. at 741-43, while the instant case involves a mid-afternoon external seizure of a residence that was designed to, and did, avoid the need for a warrantless search.

When applied to the Fourth Amendment's balancing test, these two factors, the greater legal consequence of the offenses and the lesser intrusion of daytime impoundment, both militate in favor of a finding of reasonableness. Indeed, the *Welsh* Court considered the seriousness of the offense to be related to the presence of exigent circumstances sufficient to justify a warrant-

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[2] Welsh himself was ultimately charged with a criminal misdemeanor because of a prior conviction; however, because the arresting officers did not know of the prior conviction, the Court considered the officers to have had probable cause to believe only that he had committed a civil violation. 466 U.S. at 746 n.6.

less entry. 466 U.S. at 749-52. Because the impoundment effected in this case required no entry at all, and in the absence of any non-consensual entry, this case really presents no occasion to consider the application of an exception to the search warrant requirement.

II. THE DISTINCTION BETWEEN FELONIES AND MISDEMEANORS IS NOT SUITED TO SUPPORTING A "BRIGHT-LINE RULE" TO GOVERN THE PROPRIETY OF EXTERNAL IMPOUNDMENT.

Respondent urges the Court to seize upon the legal character of the charges against him by creating a "bright line rule" for determining whether "the seizure of and warrantless entry into the home" to preserve evidence is authorized. Resp. Brief at 29. Assigning determinative weight to the legal classification of an offense would go well beyond *Welsh*, which merely held that the seriousness of the offense was a factor to be considered in determining whether warrantless entry was proper, 466 U.S. at 751, 753. Lower court cases cited by Respondent (Resp. Brief at 26-28) involved felonies, but none held that warrantless provisional measures would not have been justified by misdemeanor offenses.

Laying aside the fact that no warrantless entry occurred in this case except by consent, the felony-misdemeanor distinction is a poor one upon which to base such a rule. The classification of an offense as a misdemeanor is simply not a reliable indicator that the offense is not serious. In asserting broadly that misdemeanor offenses lack sufficient consequence to justify warrantless impoundment or entry, Respondent cites a few such provisions of Illinois criminal law that he

deems wanting. Resp. Brief at 35. His list omits more weighty misdemeanor offenses, including 720 ILCS 5/11-9.1(a) (sexual exploitation of a child), 5/12-2(a) (numerous forms of aggravated assault), 5/12-3.1 (battery of an unborn child), 5/12-3.2 (domestic battery), 5/12-15 (certain forms of criminal sexual abuse), 5/12-21.6 (endangering the life or health of a child), 5/24-1 (certain weapons possession offenses), 5/24-3.1 (certain firearms possession offenses), and 5/31-1 (resisting or obstructing a peace officer). The designation of these offenses as misdemeanors demonstrates, as this Court has recognized, that the felony/misdemeanor distinction, once "'broad and deep,'" is now "minor and often arbitrary," and that "numerous misdemeanors involve conduct more dangerous than many felonies." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (citation omitted).

The legal classification of criminal offenses based on available punishments also does not lend itself to useful application by officers in the field. To be of any use, a line, however bright, must be visible to the observer under the conditions in which it is to be observed. Whether a crime is classified as a felony or misdemeanor depends on the lawful range of available sentences, a consideration divorced in time and relevance from the concerns that are paramount when someone's conduct is being investigated. Despite Respondent's contentions to the contrary, the assumption that officers in the field are specifically aware of the sentencing classification of offenses is unsupported and does not comport with common sense or the definition of their jobs. Whether a crime is a felony or a misdemeanor is primarily a concern of lawyers and judges.

Moreover, even assuming a police officer happens to know whether a particular offense is a felony or misdemeanor, it is unlikely that he or she would know, or even could know, in the midst or even (as here) at the outset of an investigation, what crime (or crimes) will ultimately be charged. Similar concerns prompted the Court, soon after *Welsh* was decided, to decline to create an exception to the rule of *Miranda v. Arizona*, 384 U.S. 436 (1986), based on the nature of the offense under investigation. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court concluded that officers questioning an arrested suspect were not in a good position to predict what charges might ultimately be brought. The Court reasoned that officers acting at that preliminary stage often would not know sufficient facts to choose from among a series of available charges, perhaps because the charges ultimately brought might depend on facts they could not then know (including events that had not yet occurred), or because an investigation into a minor offense could escalate into a more serious one. 468 U.S. at 430-31.

The circumstances of this case well illustrate these points. The information supplied by Tera McArthur did not include the quantity of marijuana Respondent had hidden under his couch. Without that information, Officer Love could not have known whether its mere possession would have been a felony or a misdemeanor. Because not more than 2.5 grams of marijuana was recovered, Respondent was charged with a misdemeanor violation under 720 ILCS 550/4(a) (as well as two misdemeanor paraphernalia violations). Had the quantity been 30 grams or more, even its mere possession would have been a felony under 720 ILCS 550/4(d).

Likewise, as in *Welsh* (*see supra* at p. 2, n. 2), if Respondent had a prior conviction for a like offense, a fact the officers would not have been in a position to know at the time (*see Berkemer*, 468 U.S. at 430-31), possession of a mere 10 grams would have given rise to a felony charge, 720 ILCS 550/4(c). The officers also could not know, as they stood outside Respondent's trailer, whether even a small quantity of marijuana would ultimately prove to be evidence of a broader or more aggravated course of felony conduct, such as conspiracy, distribution or trafficking, or delivery to a type of person protected by a specific statute. *See* 720 ILCS 550/5 through 550/9.

The distinction between felonies and misdemeanors may readily be applied to determinations made by judges and lawyers in legal proceedings, such as whether a defendant has a right to a jury trial, *see Duncan v. Louisiana*, 391 U.S. 145 (1968), or to be represented by counsel at trial, *see Argersinger v. Hamlin*, 407 U.S. 25 (1972), but not to decisions, like that considered in *Berkemer*, that must be made by police officers in the field as the events of a criminal investigation unfold. It is particularly unsuited to use in decisions involving the execution of search warrants. Issuance of a search warrant depends not on whether an entire offense has been established, even if only by probable cause; instead an officer need only aver the presence of some evidence relevant to the commission of a crime. (For example, the warrant in this case authorized a search for items "which have been used in the commission of, or which constitute evidence of" possession of marijuana. Jt. App. 3.). Search warrants are by definition preliminary devices designed to assist in determining what charges may ultimately be appropriate; the manner of their

execution, and the procedures available to ensure that their execution is effective, should not be guided by what a full and complete investigation may ultimately dictate.

Although *Welsh* promotes consideration of the seriousness of an offense as a factor to be weighed in the Fourth Amendment balance, consideration of that factor does not dictate the result in this case, nor does it promote Respondent's proposed bright-line rule. The possession of even the drug amount recovered in this case, as well as paraphernalia designed for its use, was deemed sufficiently serious by the Illinois legislature to justify criminal sanctions that could include imprisonment. More to the point, the law places no limitation on the use of search warrants themselves in misdemeanor cases. Absent such a restriction, the impoundment procedure employed by Officer Love in aid of obtaining a warrant was a reasonable measure designed to preserve the efficacy of the warrant process. Moreover, *Welsh* does not support the elevation of the felony/misdemeanor distinction to a controlling principle. It has no real relevance to officers in the field, who will seldom have either the particulars or the precognition to foretell what charges a prosecutor may bring once the investigation is complete.

III. OFFICER LOVE'S CONDUCT FALLS WITHIN A REASONABLE RULE ALLOWING EXTERNAL IMPOUNDMENT OF A RESIDENCE BASED ON PROBABLE CAUSE WHILE A SEARCH WARRANT IS SOUGHT.

Aside from his contention that his offense was not serious enough, Respondent does not seem to dispute

the notion that officers armed with probable cause may secure a residence from the outside while they seek a warrant to search it. Instead, Respondent claims that his situation does not fit within the parameters of a reasonable rule allowing such action. In fact, this case presents a paradigmatic example of external impoundment as an appropriate response. Officer Love's actions were necessary to preserve evidence of a crime and sufficiently supported to warrant the intrusion, which was itself sufficiently mitigated to accommodate Respondent's constitutionally-protected privacy rights.

Two of Respondent's initial contentions may be disposed of quickly. His claim that probable cause was lacking at the time of the impoundment because Tera McArthur had not told the officers that she knew what marijuana looked like is also new to this case; as the appellate court noted, Pet. App. 4, Respondent did not contest the existence of probable cause for the seizure below.[3] His challenge now made defies common sense. Mrs. McArthur told Officer Love that Respondent had "dope" in the trailer and, when asked what kind, identified it as "pot." Jt. App. 15, 19. The officer was entitled to assume that, by identifying the substance as marijuana, Mrs. McArthur was tacitly asserting that she knew what marijuana looked like. This conclusion was further supported by her statement that Respondent had hidden the substance under the couch, Jt. App. 19. Language in her warrant affidavit explicitly

[3] In his brief in this Court, Respondent claims he did not "dispute" probable cause because he did not "concede" it and that he did claim on appeal that he was essentially arrested without probable cause, Resp. Brief at 12, assertions that do not contradict the appellate court's statement.

memorializing her recognition (Jt. App. 9) was merely a matter of form and did not undermine Officer Love's reasonable assumption to that effect. Respondent's suggestion that the seizure of his home lasted too long is similarly meritless. Although Respondent correctly notes that this Court disapproved a seizure of property that lasted 90 minutes in *United States v. Place*, 462 U.S. 696, 710 (1983), that seizure was supported only by reasonable suspicion. The seizure in this case was effected based on probable cause, which, as explained in Petitioner's opening brief (at 16), has been held to be a sufficient basis to permit provisional seizures of property for the time required to obtain a warrant. The impoundment of Respondent's trailer lasted at most two hours and perhaps less than that (*see* Pet. Brief at 4 and n. 2), an eminently reasonable period in which to draft and submit a warrant. There has been no suggestion of undue or intentional delay on the part of the officers in obtaining it.

Respondent's assertion that he did not consent to being observed from his doorway by Officer Love when he briefly re-entered his home after it had been secured should also be rejected, and not just because those entries were inconsequential. Initially, Respondent is wrong in claiming that Petitioner waived the argument that Respondent consented to these entries. Petitioner did argue consent in the appellate court in its reply brief (at page 7-8). Because Respondent did not raise unlawful entry as grounds for suppression in the trial court at all, and did so for the first time in his brief on appeal, that reply brief presented Petitioner's first opportunity to make the point. Respondent is also wrong in asserting that Petitioner "admitted" that he did not

consent (Resp. Brief at 22); the statements he cites in Petitioner's appellate court brief refer to his initial refusal to consent to a search of the trailer, and not to his later consent to be observed inside once Officer Love had secured it.

In any event, Respondent has not made out a claim of unlawful coercion. His reliance on *Bumper v. North Carolina*, 391 U.S. 543 (1968), and *Johnson v. United States*, 333 U.S. 10 (1948), is misplaced. In both those cases, entry was gained as a result of acquiescence to officers who, in fact, had no lawful authority to enter. *Bumper*, 391 U.S. at 549-50; *Johnson*, 333 U.S. at 13-15. Because Officer Love was entitled to impound Respondent's trailer, Respondent yielded to the officer's actual and lawful authority to prevent him from entering alone in deciding to allow the officer to observe him. The fact that he would have preferred, on the whole, to enter alone did not make his consent constitutionally involuntary.

Respondent's attempts to escape the implications of *Segura v. United States*, 486 U.S. 796 (1984), for his case are unavailing. Despite the endorsement of the concept of external impoundment by all members of that Court, *see* Pet. Brief at 17-18, Respondent insists that the case has no bearing on one in which the homeowner is present and has his freedom of movement in some way restricted. In this regard it is worth noting that Respondent concedes, although his movement was restricted, that his person was not seized. Resp. Brief at 13-14. It is difficult to imagine how a residence could be effectively secured without placing *some* restriction on the movements of persons inside, a concept that could not have been lost on the members of the *Segura*

Court in expressing their approval of external impoundment.[4] Indeed, no member of the Court relied on the absence (due to arrest) of the occupants of the apartment in expressing their approval of external impoundment; the issue of the occupants' absence arose only in discussions regarding the internal nature and 18-20-hour length of the impoundment of the apartment. 468 U.S. at 813 (Opinion of Burger, C.J., joined by O'Connor, J.); *id.* at 826-827 (Stevens, J. dissenting).

As noted above, Respondent's claim that there was no showing of exigent circumstances is irrelevant. Exigent circumstances are a predicate for exception from the warrant requirement, *United States v. Karo*, 468 U.S. 705, 714-15 (1984); *Steagald v. United States*, 451 U.S. 204, 211-12 (1981), and have not been held to be necessary in the absence of a warrantless entry (or, as here, an entry supported by another exception, *i.e.* that of consent). Even if such circumstances were required in this case, they were clearly present. Respondent has admitted as much, both in person and through counsel. At the suppression hearing, Respondent conceded that he would have destroyed the evidence had he been given the opportunity. Jt. App. 27, 29. Respondent's refusal to recognize the implications of that concession is steadfast, even to the point that he relies on it to argue that preventing him from doing so caused the seizure of that

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[4] It is especially hard to ascribe significance to preventing someone from entering his home in this case, considering that Officer Love could have arrested Respondent and thereby restricted his movements entirely, *see* Pet. Brief at 13-14, as *amicus* National Association of Criminal Defense Attorneys, apparently without irony, suggests he should have, Brief of NACDL at 14-15.

evidence he now challenges. Resp. Brief at 37-38. This argument contravenes the *Segura* Court's rejection of a "'constitutional right' to destroy evidence," 468 U.S. at 816.

The exigency in this case was not the risk, but the certainty, of the destruction of evidence. And regardless of how "imminent" the law requires that destruction to be, *see* Resp. Brief at 17, this case possesses more than the necessary immediacy. There is no reason to believe that, had he been permitted to re-enter his home alone, Respondent would have delayed in destroying the evidence in accordance with the intention he has so candidly declared. That intention might well have arisen as soon as the officers arrived at the trailer, *see* Pet. Brief at 12 n. 9, but became acute once Officer Love had sought consent to search.

IV. SUPPRESSION IN THIS CASE WOULD DISSERVE THE POLICIES BEHIND THE EXCLUSIONARY RULE BY PENALIZING AN OFFICER'S DELIBERATE EFFORTS TO HONOR A DEFENDANT'S CONSTITUTIONAL RIGHTS.

Finally, this Court should reject Respondent's suggestion that the policies behind the exclusionary rule require suppression of the evidence in this case.[5] Respon-

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[5] Although Respondent argues that Petitioner has waived any claim in this regard in this Court, that assertion is inaccurate. The appellate court decided this case on the basis of its conclusion that the securing of Respondent's residence violated the Fourth Amendment, and never addressed any claim related to the validity of the warrant later issued. Pet. App. 11-14. Should this Court agree with the lower court's position on the Fourth Amendment claim and decide not to reach the issue of (continued...)

dent concedes that he is asking this Court to reexamine *Segura*, but offers no substantive grounds upon which to do so. Instead, he argues that suppression is necessary to avoid the elimination of "incentives" on the part of police officers to follow constitutional rules. Acceptance of this argument would not only require overruling *Segura*; it would also contravene *Murray v. United States*, 487 U.S. 533, 539-40 (1988), in which the Court found the incentives created by the exclusionary rule to be just the opposite.

Respondent's reliance on the policy underlying the exclusionary rule is especially ironic in light of the facts of this case. He argues that "without the application of the exclusionary rule, there is no incentive for the police not to seize a person's home *and make a warrantless entry inside* under the guise of preserving evidence. . . ." Resp. Brief at 38 (emphasis supplied). If anything is clear from the way Officer Love conducted himself in this case, however, it is that he demonstrated an awareness of and sensitivity to Respondent's Fourth Amendment rights and, implicitly, the possibility of exclusion of anything he recovered if he violated those rights. Officer Love eschewed the warrantless entry of which Respondent complains in favor of the less intrusive option of external impoundment precisely because of that concern. To repay the sort of conscious regard for constitutional rights that this Court encourages in police officers would essentially turn the incentives behind the exclusionary rule on their heads.

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[5] (...continued)
the validity of the warrant, nothing would preclude the appellate court from considering the issue (including any claim of waiver in that court) on remand.

CONCLUSION

The judgment of the Appellate Court of Illinois should be reversed.

Respectfully submitted,

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September 20, 2000

No. 99-1132

JUL 13 2000

In the Supreme Court of the United States

ILLINOIS, PETITIONER

v.

CHARLES MCARTHUR

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether police officers who have probable cause to believe that a residence contains incriminating evidence may temporarily prevent entry in order to preserve the evidence while they seek a search warrant.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	4
Argument:	
Police officers who have probable cause to believe that a residence contains incriminating evidence may temporarily prevent entry in order to preserve the evidence while they seek a warrant	6
A. By preventing entry into respondent's trailer, the police officers seized the trailer but did not seize respondent	8
B. The temporary seizure of respondent's trailer was reasonable because the officers had probable cause to believe that it contained incriminating evidence	11
C. Individualized suspicion that evidence would be destroyed was not necessary to support the temporary seizure	19
D. This case involves neither a constructive eviction nor a search without a warrant or consent	24
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Adams v. *Williams*, 407 U.S. 143 (1972)	14
Arkansas v. *Sanders*, 442 U.S. 753 (1979)	5, 13, 15, 20
California v. *Acevedo*, 500 U.S. 565 (1991)	14-15, 20
California v. *Hodari D.*, 499 U.S. 621 (1991)	8, 9
Carroll v. *United States*, 267 U.S. 132 (1925)	5, 13
Chambers v. *Maroney*, 399 U.S. 42 (1970)	20, 21
Chicago v. *Morales*, 527 U.S. 41 (1999)	10

Cases—Continued: Page

Chimel v. *California*, 395 U.S. 752 (1969) 13, 22
Colorado v. *Bannister*, 449 U.S. 1 (1980) 9
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 25
Flippo v. *West Virginia*, 120 S. Ct. 7 (1999) 17, 18, 22
Florida v. *Bostick*, 501 U.S. 429 (1991) 9
G.M. Leasing Corp. v. *United States*, 429 U.S. 338 (1987) 16
Harris v. *United States*, 390 U.S. 234 (1968) 9
Horton v. *California*, 496 U.S. 128 (1990) 5, 9, 13, 15, 21
Illinois v. *Rodriguez*, 497 U.S. 177 (1990) 25
Jones v. *United States*, 357 U.S. 493 (1958) 14, 16
Katz v. *United States*, 389 U.S. 347 (1967) 24
Ker v. *California*, 374 U.S. 23 (1963) 12
Maryland v. *Wilson*, 519 U.S. 408 (1987) 11
Michigan v. *Summers*, 452 U.S. 692 (1981) 10, 12, 14
Michigan v. *Tyler*, 436 U.S. 499 (1978) 13
Mincey v. *Arizona*, 437 U.S. 385 (1978) 17, 22
New York v. *Harris*, 495 U.S. 14 (1990) 16, 26
Payton v. *New York*, 445 U.S. 573 (1980) 5, 16
Richards v. *Wisconsin*, 520 U.S. 385 (1997) 12, 13
Segura v. *United States*, 468 U.S. 796 (1984) ..... *passim*
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920) 11
Soldal v. *Cook County*, 506 U.S. 56 (1992) 13, 14
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 14
United States v. *Chadwick*, 433 U.S. 1 (1977) 13, 14, 21
United States v. *Crews*, 445 U.S. 463 (1980) 11, 26
United States v. *Jacobsen*, 466 U.S. 109 (1984) 8, 13
United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) 17
United States v. *Jeffers*, 342 U.S. 48 (1951) 13, 17, 22
United States v. *Leon*, 468 U.S. 897 (1984) 8

Cases—Continued: Page

United States v. *Mendenhall*, 446 U.S. 544 (1980) 9
United States v. *Place*, 462 U.S. 696 (1983) 5, 8, 13, 14, 15, 17, 21
United States v. *Rosi*, 27 F.3d 409 (9th Cir. 1994) 26
United States v. *Santana*, 427 U.S. 38 (1976) 6, 13, 24
United States v. *Van Leeuwen*, 397 U.S. 249 (1970) 14
United States v. *Watson*, 423 U.S. 411 (1976) 21-22, 23
Warden v. *Hayden*, 387 U.S. 294 (1967) 13
Wyoming v. *Houghton*, 526 U.S. 295 (1999) 23

Constitution and statutes:

U.S. Const. Amend. IV ..... *passim*
720 Ill. Comp. Stat. (West 1993 & Supp. 2000):
§ 5/31-4(a) 11
§ 550/4 10
§ 600/3.5 (Supp. 2000) 10

Miscellaneous:

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Vol. 1 (3d ed. 1996) 8-9, 24
Vol. 3 (1978) 14
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S. Rep. No. 2464, 81st Cong., 2d Sess. (1950) 22

In the Supreme Court of the United States

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ILLINOIS, PETITIONER

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether police officers who have probable cause to believe that a residence contains incriminating evidence may temporarily prevent entry while they seek a search warrant. The United States has a significant law enforcement interest in ensuring that police officers may take that reasonable step in order to preserve the evidence that is the object of the warrant.

STATEMENT

On April 2, 1997, respondent's wife went to the trailer she shared with respondent to remove her property from the residence. At her request, two police officers accompanied her. Pet. App. 2. The officers remained outside the trailer while she removed her belongings. J.A. 25-26. Afterwards, she told the

officers that respondent had marijuana hidden under the couch. An officer then knocked on the door and, when respondent answered, informed him of his wife's accusation and asked for permission to search the trailer. Respondent denied that he had drugs in the trailer but refused to consent to a search. Pet. App. 2.

Within earshot of respondent, who had come out on the porch in front of the trailer, one of the officers asked respondent's wife if she would accompany the other officer to a magistrate to obtain a search warrant. J.A. 26; Pet. App. 2. She agreed and departed with one of the officers. The other officer told respondent what was happening. From that time until the officers obtained the warrant, they did not allow respondent to enter the trailer unless he agreed to be accompanied by an officer. Respondent, so accompanied, entered the trailer two or three times to obtain cigarettes and to make telephone calls. At those times, the officer stood just inside the doorway. Pet. App. 2-3. Following one of the phone calls, respondent's mother arrived at the residence. She too was told that she was not permitted to enter unless accompanied by an officer. J.A. 17-18.

While the police officers awaited the arrival of the warrant, no officer told respondent that he was under arrest, threatened or restrained him, placed him in handcuffs, or told him he was not free to leave. Pet. App. 3. In less than two hours, an officer returned with the warrant, at which time the officers entered the trailer, located the marijuana and drug paraphernalia, and placed respondent under arrest. *Ibid.*; J.A. 27.

Respondent was charged with possession of cannabis and drug paraphernalia, in violation of Illinois law. He filed a pretrial motion to suppress the evidence on the ground that the police officers had violated the Fourth Amendment by preventing him from entering his

trailer while they obtained the search warrant. Pet. App. 1-2. He did not contest the validity of the warrant or that the officers had probable cause to believe the residence contained marijuana and to secure the residence. *Id.* at 4. At the suppression hearing, respondent testified that he would have destroyed the marijuana if he had been permitted to enter the trailer alone. J.A. 27.

The trial court granted respondent's motion to suppress, and the Appellate Court of Illinois affirmed. Pet. App. 1-14. The appellate court noted that, in *Segura* v. *United States*, 468 U.S. 796 (1984), "the Court seemed to agree that the seizure of a residence and its contents is permissible absent exigent circumstances if there is probable cause, but that entry into the residence when securing it requires probable cause and exigent circumstances." Pet. App. 8. The appellate court opined, however, that *Segura* did not address whether police officers, while securing a dwelling, may "limit the freedom of movement of persons within, into or out of the secured premises." *Ibid.* (quoting 3 Wayne R. LaFave, *Search and Seizure* § 6.5(c) at 366 (3d ed. 1996)) (internal quotation marks omitted). The court also noted that *Segura* did not address cases in which "police enter and incident to the entry either keep persons entitled to be in the premises under close scrutiny or else require such persons to leave or not enter those premises." *Ibid.* (quoting 3 LaFave, *supra*, § 6.5(c) at 365).

The court concluded that "[t]his case represents a situation that *Segura* did not address" and that "there was no authority for the police action in this case." Pet. App. 12. The court recognized that "there is no evidence the police affirmatively ordered [respondent] out of the trailer." *Id.* at 11-12. The court nonetheless held that "the police conduct amounted to a constructive

eviction of [respondent] from his residence" because respondent was on "the front porch when police told him he had to remain outside the trailer" and he was thus "still on his premises." *Id.* at 12. The court further concluded that the police officers "secured the dwelling from the inside" because an officer accompanied respondent when he went inside to obtain cigarettes and to make phone calls. *Ibid.* That entry, the court held, was illegal because, in the court's view, it was not justified by exigent circumstances. The court concluded that "the police conduct in securing [respondent's] residence while awaiting the search warrant was an unreasonable seizure (and probably an unreasonable search) under the fourth amendment so that the evidence discovered in the residence upon execution of the search warrant was properly suppressed." *Id.* at 13.[1] The Supreme Court of Illinois denied petitioner leave to appeal. *Id.* at 15.

SUMMARY OF ARGUMENT

Although the police officers seized respondent's trailer when they temporarily prevented his entry, that seizure was reasonable under the Fourth Amendment. To determine the reasonableness of a seizure, the Court balances the government's law enforcement interests against the intrusion on Fourth Amendment interests. That analysis indicates that police officers who have probable cause to believe that a residence contains

[1] The court speculated that the police officers may also have unlawfully seized respondent, but it did not decide that issue. Pet. App. 13-14. The court did not address petitioner's argument (Illinois Br. 18, 35-37) that, even if securing respondent's residence was unlawful, the contraband discovered later during the search pursuant to a valid, untainted warrant was admissible because it had an independent source.

evidence may temporarily prevent entry in order to preserve the evidence while they seek a warrant.

The Court has repeatedly recognized that there is a strong law enforcement interest in preventing tampering with evidence. On the other side of the balance, the intrusion caused by a seizure, which invades only possessory and not privacy interests, is limited. Moreover, the seizure here—a bar on entry pending issuance of a warrant—is temporary and restricts only immediate use of the property.

The Court's precedents confirm that the interest in preserving evidence can temporarily supercede an individual's possessory interest in property when there is probable cause to believe that the property contains incriminating evidence. Police officers may make such warrantless seizures of evidence in plain view; they may also seize containers and vehicles based on probable cause to believe that they are associated with criminal activity. See *Horton* v. *California*, 496 U.S. 128, 136-137 (1990); *United States* v. *Place*, 462 U.S. 696, 701-702 (1983); *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925). In dicta, the Court has approved the conduct at issue here—securing premises from the outside to prevent destruction of evidence within. See, *e.g.*, *Segura* v. *United States*, 468 U.S. 796 (1984). Because securing a dwelling from the outside by preventing entry does not invade the physical integrity of the residence or the privacy of the occupants, the rule that a warrant or a valid exception is required when police officers enter or search a home is not implicated. Cf. *Payton* v. *New York*, 445 U.S. 573 (1980).

Although the police officers had particularized suspicion that respondent would destroy evidence if he was allowed to enter his trailer unaccompanied, the Fourth

Amendment does not require such individualized suspicion before officers may secure a residence from the outside while seeking a warrant. The inherent risk of tampering with evidence justifies that limited interference with the owner's use of his property. Requiring individualized suspicion would impose unwarranted impediments to law enforcement and generate unnecessary litigation.

The Appellate Court of Illinois erred in concluding that the police officers constructively evicted respondent and entered his trailer without his consent or a warrant. Respondent was on his front porch when the officers prevented his entry into the trailer, and that location, which is exposed to and used by the visiting public, is not protected by the Fourth Amendment from government intrusion. See *United States* v. *Santana*, 427 U.S. 38, 42 (1976). An officer entered the trailer without a warrant only to accompany respondent when he made phone calls and obtained cigarettes. Respondent, who had lawfully been instructed that he could only enter if he agreed to be accompanied, consented to those entries.

ARGUMENT

POLICE OFFICERS WHO HAVE PROBABLE CAUSE TO BELIEVE THAT A RESIDENCE CONTAINS INCRIMINATING EVIDENCE MAY TEMPORARILY PREVENT ENTRY IN ORDER TO PRESERVE THE EVIDENCE WHILE THEY SEEK A WARRANT

In *Segura* v. *United States*, 468 U.S. 796 (1984), the Court held that the Fourth Amendment's exclusionary rule did not require the suppression of evidence seized from a residence pursuant to a valid search warrant even though federal agents had earlier entered illegally and then remained inside to prevent destruction of

evidence. *Id.* at 799, 813-816. Five Justices agreed that the exclusionary rule did not apply. *Ibid.* Two Justices also addressed whether the agents' securing of the premises complied with the Fourth Amendment. *Id.* at 805-813 (Burger, C.J., joined by O'Connor, J.). Chief Justice Burger and Justice O'Connor concluded that, when police officers have probable cause to believe that a residence contains evidence of criminal activity, they may temporarily secure the dwelling to prevent removal or destruction of evidence. *Ibid.*

This case poses a question similar to the one addressed by Chief Justice Burger and Justice O'Connor in *Segura*: whether police officers may, while they seek a search warrant, secure a residence (in this case, from the outside) when they have probable cause to believe that it contains incriminating evidence. As the Appellate Court of Illinois recognized, "[a]t the heart of this issue is the preservation of evidence. Clearly, if police secure a dwelling they prohibit the destruction of the sought-after evidence. On the other hand, if police do not secure a dwelling, they risk losing the evidence." Pet. App. 11. Contrary to the conclusion of the appellate court, however, the Fourth Amendment does not prevent police officers from guarding against that risk. Police officers who have probable cause to believe that a residence contains incriminating evidence may temporarily prevent entry in order to preserve the status quo while they seek a warrant.[2]

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[2] Respondent has contested neither the existence of probable cause to believe that his trailer contained marijuana nor the validity of the search warrant obtained by the police officers. Pet. App. 4. This case therefore does not present the question whether a temporary prohibition on entry into a residence requires suppression when police officers reasonably believe that they have probable cause but a magistrate or a reviewing court ultimately

A. By Preventing Entry Into Respondent's Trailer, The Police Officers Seized The Trailer But Did Not Seize Respondent

"From the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991) (quoting 2 Noah Webster, *An American Dictionary of the English Language* 67 (1828); 2 John Bouvier, *A Law Dictionary* 510 (6th ed. 1856); *Webster's Third New International Dictionary* 2057 (1981)). A seizure of property thus occurs "when there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). Therefore, the police officers "seized" respondent's trailer when they interfered with his possessory interests by temporarily preventing his unaccompanied entry.[3]

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determines that their belief was mistaken. Cf. *United States* v. *Leon*, 468 U.S. 897, 926 (1984). Nor does the case present the question whether preventing entry may be justified in some circumstances when police officers have only reasonable suspicion that the premises contain incriminating evidence. Cf. *United States* v. *Place*, 462 U.S. 696, 702 (1983). Finally, as we explain at pp. 24-26, *infra*, this case does not present the question whether police officers can either enter the premises or order the occupants to leave in order to secure the premises. See generally 3 Wayne R. LaFave, *Search and Seizure* § 6.5(c) at 361-373 (3d ed. 1996 & Supp. 1999).

[3] The seizure of the trailer was not, however, also a seizure of the contraband that the officers discovered only when they later searched the trailer pursuant to a warrant. Police officers seize a tangible, movable object only when they take it under their physical control. See *Hodari D.*, 499 U.S. at 624 ("For most purposes at common law, ["seizure"] connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control."); 1 LaFave, *supra*, § 2.1, at 375-376 (3d ed. 1996) (defining seizure as the "act of physically taking and removing tangible personal property"). Police officers therefore do not seize evidence until they actually discover it and assert control over it, even if they have secured the premises where the evidence is located. For that reason, the Court has given detailed consideration to the circumstances in which police officers may seize evidence found in plain view while executing a warrant, even though the area being searched is already under their custody and control. See, *e.g.*, *Horton* v. *California*, 496 U.S. 128 (1990). And the Court has characterized the taking of individual items from an automobile as a seizure even when police officers had previously seized the automobile. See, *e.g.*, *Colorado* v. *Bannister*, 449 U.S. 1, 3-4 (1980); *Harris* v. *United States*, 390 U.S. 234, 236 (1968).

Although the officers seized respondent's residence by securing it and preventing unaccompanied entries, they did not seize respondent. A seizure of a person occurs only when "a reasonable person would believe that he or she is not 'free to leave.'" *Florida* v. *Bostick*, 501 U.S. 429, 435 (1991); see also *Hodari D.*, 499 U.S. at 627-628. Circumstances that "might indicate a seizure * * * [include] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).

The only restriction on respondent's movements was that he was not allowed to enter his trailer (unless accompanied by an officer) for less than two hours while the police obtained a search warrant. He was not threatened or physically restrained; he was not handcuffed; he was not told that he was under arrest or given *Miranda* warnings. J.A. 29-30; Pet. App. 14. Under those circumstances, a reasonable person would

not have believed that he was unable to go anywhere else he desired. Indeed, respondent agreed that the officers never indicated that he was not free to leave. J.A. 29. Thus, he was not seized within the meaning of the Fourth Amendment.

A contrary conclusion could cast doubt on the validity of well-established law enforcement practices that are commonly recognized as constitutional. Police officers often must cordon off an area during an investigation, for example, to apprehend a fugitive or to investigate a bomb threat. When they do so, they do not thereby seize the persons whom they prevent from entering the area. Cf. *Chicago* v. *Morales*, 527 U.S. 41, 69 (1999) (Kennedy, J., concurring in part and concurring in the judgment) (discussing with approval situations in which "the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official").[4]

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[4] In any event, seizure of respondent would have been justified because police officers had probable cause to believe he had committed a crime based on his wife's statement that he had marijuana hidden under his couch. See J.A. 15, 19; 720 Ill. Comp. Stat. 550/4 (West 1993 & Supp. 2000) (criminalizing possession of marijuana); *id.* 600/3.5 (West 2000) (criminalizing possession of drug paraphernalia). This case does not present the question whether, absent probable cause, seizure of respondent would have been justified as incident to the temporary seizure of his trailer pending issuance of a warrant. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981) ("a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted") (footnote omitted); *id.* at 702 n.17 (suggesting that the Court would reach the same result with regard to a lawful search without a warrant).

B. The Temporary Seizure Of Respondent's Trailer Was Reasonable Because The Officers Had Probable Cause To Believe That It Contained Incriminating Evidence

1. The essential requirement of the Fourth Amendment is that searches and seizures be reasonable. See *Maryland* v. *Wilson*, 519 U.S. 408, 411 (1997). To determine the reasonableness of a search or seizure, the Court balances the government's law enforcement interests against the intrusion on Fourth Amendment interests. *Ibid.* Application of that analysis here indicates that the police officers acted reasonably in temporarily preventing entry into respondent's trailer, which they had probable cause to believe contained incriminating evidence, in order to preserve that evidence while they sought a warrant.[5]

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[5] Even if the seizure of respondent's residence had been unlawful, the Illinois courts should not have excluded the evidence, which was seized in a lawful search pursuant to a valid, untainted warrant. The warrant, the validity of which respondent does not contest, Pet. App. 4, was supported by information that the officers obtained from respondent's wife before any interference with respondent's Fourth Amendment interests. As we noted at pp. 6-7, *supra*, the Court held in *Segura* that evidence obtained pursuant to such a warrant is admissible based on the "independent source" rule regardless of whether unlawful police action preserved the evidence. See 468 U.S. at 813-816; see generally *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). That holding applies here. The only sense in which the seized evidence could be viewed as "in some sense the product of illegal governmental activity," *United States* v. *Crews*, 445 U.S. 463, 471 (1980), is because respondent would have illegally destroyed the evidence if the officers had not prevented his entry into the trailer. See J.A. 27; 720 Ill. Comp. Stat. 5/31-4(a) (West 1993 & Supp. 2000) (criminalizing destruction of evidence to prevent apprehension). The Court rejected that reasoning in *Segura*, explaining that there is no "'constitutional right' to destroy evidence." 468 U.S. at 816. As we explained at note 1, *supra*, the appellate court did not

a. Law enforcement has a strong interest in preventing tampering with evidence pending the issuance and execution of a warrant to search for and seize that evidence. "Unless there is some kind of a power to prevent removal of material from the premises, or destruction of material during this time, the search warrant will almost inevitably be fruitless." *Segura*, 468 U.S. at 809 n.7 (Burger, C.J., joined by O'Connor, J.) (quoting Erwin Griswold, *Criminal Procedure, 1969 —Is It a Means or an End?*, 29 Md. L. Rev. 307, 317 (1969)). That interest is particularly pronounced in the case of evidence that is capable of ready destruction, such as narcotics. See *Richards* v. *Wisconsin*, 520 U.S. 385, 391 (1997) (drug investigations frequently present the risk that evidence will be destroyed if occupants have advance notice of a search); *Michigan* v. *Summers*, 452 U.S. 692, 702 (1981) (search for narcotics likely to trigger "frantic efforts to conceal or destroy evidence"); *Ker* v. *California*, 374 U.S. 23, 28 n.3 (1963) (likely that suspects will attempt to dispose of drugs before police seize them). Indeed, respondent acknowledged that he would have destroyed the marijuana if he had been allowed to reenter his trailer unaccompanied by an officer. J.A. 27.

This Court has recognized the importance of the interest in preventing tampering with evidence in a variety of contexts. A limited search incident to an arrest is permitted in part because of the danger of destruction of evidence, even when police officers have

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address the independent-source issue in its opinion in this case, although petitioner raised the issue. In their briefs before the appellate court, the parties disputed whether petitioner had properly preserved the issue. See Defendant-Appellee Br. 3; Illinois Reply Br. 12-16.

no individualized suspicion that the person arrested is concealing evidence or intends to destroy it. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969). The risk of losing evidence likewise supports the rules that incriminating evidence found in plain view, and containers and vehicles linked with criminal activity, may be seized without a warrant. See *United States* v. *Place*, 462 U.S. 696, 701-702 (1983); *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925). The danger that evidence may be lost also underlies the authority of firefighting officials to remain in a building for a reasonable time and search it after extinguishing a fire. *Michigan* v. *Tyler*, 436 U.S. 499, 510 (1978). Indeed, when police officers have individualized suspicion that evidence will be destroyed, they may make intrusions as significant as entering a dwelling without knocking and announcing their presence or obtaining a warrant. See, *e.g.*, *Richards*, 520 U.S. at 395; *United States* v. *Santana*, 427 U.S. 38, 43 (1976); *United States* v. *Jeffers*, 342 U.S. 48, 51-52 (1951).

b. The intrusion on Fourth Amendment interests at issue here—temporarily preventing entry into a residence while police officers seek a warrant—is limited. Unlike a search, which invades privacy interests, a seizure affects only possessory interests. See *Horton* v. *California*, 496 U.S. 128, 133 (1990); *Soldal* v. *Cook County*, 506 U.S. 56, 62-63 (1992); *Jacobsen*, 466 U.S. at 113 & n.5, 122, 126 (1983); *United States* v. *Chadwick*, 433 U.S. 1, 13-14 & n.8 (1977). Seizures of property, such as the prohibition on entry here, are thus generally less intrusive than searches, because privacy is the "principal object" protected by the Fourth Amendment, *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). See *Segura*, 468 U.S. at 806 (Burger, C.J., joined by

O'Connor, J.); *Chadwick*, 433 U.S. at 13-14 n.8. See also *Jones* v. *United States*, 357 U.S. 493, 498 (1958) ("The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted invasions into his privacy."). Cf. *Soldal*, 506 U.S. at 62-66 (rejecting contention that seizures involving no intrusion on privacy or personal liberty are immune from scrutiny under the Fourth Amendment).

The intrusion on respondent's Fourth Amendment interests was particularly limited because the police officers prohibited entry into his trailer only temporarily (for less than two hours while they obtained a search warrant) and because they did not infringe his other possessory interests—such as the right to sell or to encumber the property. See J.A. 27. This Court has repeatedly recognized that temporary seizures are less intrusive than permanent ones. See, *e.g.*, *Place*, 462 U.S. at 705-706, 709; *Summers*, 452 U.S. at 701, 705 n.21; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975); *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); *United States* v. *Van Leeuwen*, 397 U.S. 249, 252-253 (1970).

Moreover, the intrusiveness of a seizure to preserve evidence while police officers seek a warrant is further reduced because there should be a prompt judicial determination whether there is probable cause to search the house and seize evidence within it. See *Place*, 462 U.S. at 709; *Summers*, 452 U.S. at 701 n.14 (quoting with approval 3 Wayne R. LaFave, *Search and Seizure* § 9.2, at 40 (1978) (reasonableness of a detention may be determined in part by "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon")); *California* v. *Acevedo*, 500 U.S. 565, 575

(1991) ("we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases").[6]

2. The Court's precedents confirm that "society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in property, provided that there is probable cause to believe that that property is associated with criminal activity." *Segura*, 468 U.S. at 808 (Burger, C.J., joined by O'Connor, J.). For example, as we discussed above, if police officers have probable cause to believe that a container holds evidence, they may seize the container while they secure a warrant. See, *e.g.*, *Acevedo*, 500 U.S. at 575; *Sanders*, 442 U.S. at 761. Indeed, they may seize it pending investigation based upon reasonable suspicion. See *Place*, 462 U.S. at 706. Further, when police officers are lawfully present in a particular place, they may seize evidence in plain view provided they have probable cause to believe that it is associated with criminal activity. See, *e.g.*, *Horton*, 496 U.S. at 136-137; *Place*, 462 U.S. at 701-702. These precedents reflect the principle that, because of the general risk of tampering with or loss of evidence, police officers may take reasonable measures to preserve the status quo pending issuance of a search warrant.

That principle also applies when, as in this case, police officers have probable cause to believe that evidence is contained in a dwelling. They may secure the dwelling to preserve the evidence by preventing entry for a reasonable period while they seek a warrant to search for and seize the evidence.

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[6] The intrusion on respondent's Fourth Amendment interests was even more limited because the police allowed him to enter his trailer accompanied by an officer. J.A. 22, 27-28, 30.

a. Absent consent or exigent circumstances, a warrant is generally necessary to enter a dwelling whether to make an arrest or to search for and seize evidence that may be inside. See *Payton* v. *New York*, 445 U.S. 573, 586-590 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). "But the home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within." *Segura*, 468 U.S. at 810 (Burger, C.J., joined by O'Connor, J.).

As the Court made clear in *Payton*, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." 445 U.S. at 585. Entry into a dwelling invades the privacy interests that lie at the heart of the Fourth Amendment. See *id.* at 587-588 & n.26; *Jones*, 357 U.S. at 498. Therefore, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances [or consent], that threshold may not reasonably be crossed without a warrant." 445 U.S. at 590. See also *New York* v. *Harris*, 495 U.S. 14, 17 (1990) (explaining that "the rule in *Payton* was designed to protect the *physical integrity* of the home") (emphasis added).

When police officers temporarily secure a dwelling from the outside, as they did here, they do not make an entry or otherwise invade the occupant's privacy interests in the home. The considerations that justify the warrant requirement are therefore absent, and the general rule permitting temporary seizures to preserve evidence based on probable cause applies.[7]

[7] Of course, a temporary seizure that would otherwise be lawful may be rendered unlawful by the manner in which it is executed,

b. The Court's opinions reflect the understanding that a temporary seizure of a dwelling to preserve evidence pending issuance of a warrant is reasonable under the Fourth Amendment. For example, in *Jeffers*, 342 U.S. at 52, the Court held that a warrantless *entry* into a hotel room was unconstitutional because there were no exigent circumstances, such as "imminent destruction, removal, or concealment of the property intended to be seized." The Court reasoned that police officers "could have easily prevented any such destruction or removal by merely guarding the door." *Ibid.* Similarly, in *Mincey* v. *Arizona*, 437 U.S. 385, 395 (1978), the Court held unconstitutional a warrantless *search* of an apartment in which a homicide had been committed. The Court noted approvingly, however, the use of a police guard to prevent destruction of evidence. *Id.* at 394. And, in *Flippo* v. *West Virginia*, 120 S. Ct. 7 (1999) (per curiam), the Court reaffirmed that a warrantless search of a dwelling in which a homicide has occurred is not permitted, but did not suggest that police officers acted improperly in "clos[ing] off the area" (*ibid.*) and "secur[ing]" the scene (*id.* at 8). Indeed, in rejecting the contention that the trial court had found the search justified by exigent circum-

including its duration. See *Place*, 462 U.S. at 707-710. And a total, permanent seizure of a dwelling may so significantly intrude on the occupant's possessory interests that even a warrant is not sufficient. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) (due process requires notice and hearing before seizure of real property for forfeiture because such a seizure gives government the right to prohibit sale, to evict occupants, to modify the property, to condition occupancy, and to receive rents). The seizure for the purposes of preserving evidence that occurred here, however, lasted less than two hours and involved only a limited restriction on respondent's right to use his property.

stances, the Court reasoned that "[i]t seems implausible that the court found that there was a risk of intentional or accidental destruction of evidence at a 'secured' crime scene." *Id.* at 8 n.2.

In *Segura*, the Court addressed the securing of a dwelling from the inside. As noted above, in that case, federal agents entered an apartment, arrested the occupants, and then remained on the premises to preserve evidence until they obtained a warrant. 468 U.S. at 800-801. The government conceded that the entry was illegal but argued that the subsequent securing of the premises was lawful and that evidence obtained in a search pursuant to the warrant was admissible. *Id.* at 804. The Court upheld the admissibility of the evidence. See *id.* at 798-799.

Chief Justice Burger, in a portion of the opinion joined by Justice O'Connor, concluded that a temporary warrantless seizure of property is reasonable when police officers have probable cause to believe the property contains evidence of a crime and a seizure will preserve the status quo and the availability of the evidence. See 468 U.S. at 805-813. Applying that conclusion to the securing of premises, the Chief Justice approved of a course of action by which police officers would "secure the premises from the outside by a 'stakeout' once the security check revealed that no one other than those taken into custody w[as] in the apartment." *Id.* at 811. Five Justices joined the remainder of the opinion, which held that, regardless of the legality of the initial entry, the evidence was lawfully seized pursuant to an untainted warrant and should not be suppressed. *Id.* at 813-814. The Court indicated that the agents lawfully could have secured the premises from the outside. See *id.* at 814 ("Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here."). Indeed, even the dissenters apparently agreed that the authorities could have sealed off the premises from the outside without violating the Fourth Amendment. See *id.* at 824 n.15 (dissenting opinion) ("I assume impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter."). Thus, all of the Justices in *Segura* appear to have endorsed the external securing of a dwelling while the police seek a warrant. See 3 LaFave, *supra*, § 6.5(c) at 366.

C. Individualized Suspicion That Evidence Would Be Destroyed Was Not Necessary To Support The Temporary Seizure

In this case, the police officers had reasonable suspicion that respondent would destroy evidence if he was allowed to enter his trailer alone.[8] The Fourth

[8] Respondent's awareness of the police presence outside his residence (J.A. 25-26) was sufficient grounds for a reasonable officer to suspect that respondent would destroy narcotics that he had hidden inside. The reasonableness of that suspicion was strengthened here by several other circumstances: First, respondent knew that police officers were assisting his wife while she moved out (*ibid.*), and respondent might therefore have suspected that she would tell the officers about his drugs in order to get him into trouble (see J.A. 20). Second, after respondent's wife told the officers about the contraband, they confronted him with her accusation and sought his consent to a search. J.A. 16. Finally, after he refused, respondent overheard his wife's conversation with the officers in which she agreed to accompany an officer to seek a search warrant. J.A. 26.

Amendment, however, does not require such individualized suspicion before police officers may prevent entry into a residence while seeking a warrant. The inherent risk that evidence will be destroyed, altered, or concealed is sufficient to justify that limited interference with the owner's use of the property.[9]

1. The cases in which the Court has approved temporary seizures based on probable cause have not involved particularized suspicion that evidence would be destroyed or damaged. As Chief Justice Burger and Justice O'Connor noted in *Segura*, the Court in *Sanders* approved the warrantless seizure of a suitcase from a car even though police officers could have followed the car until a warrant issued in order to ensure that evidence would not be lost. 468 U.S. at 808; see *Sanders*, 442 U.S. at 761. See also *Acevedo*, 500 U.S. at 575 (noting that "[l]aw enforcement officers may seize a container and hold it until they obtain a search warrant" without indicating that there is any requirement of particularized suspicion that the container will be moved or its contents disturbed). Likewise, in *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the Court held that, because police officers had probable cause to search an automobile, they could seize and impound it

[9] As we noted at p. 12, *supra*, that risk is especially prevalent when the evidence for which the officers are seeking a warrant is narcotics or another readily destructible material. Nonetheless, almost all evidence is subject to tampering that may impair its usefulness to police investigators; for example, the serial numbers on stolen merchandise can be removed or obscured even if the merchandise is too large to destroy. The possibility that there may be a few situations in which there is no danger of tampering with evidence does not justify a general requirement of individualized suspicion, which would pose impediments to law enforcement and could consume significant judicial resources, see pp. 22-23, *infra*.

"for whatever period [was] necessary to obtain a warrant for the search" (*id.* at 51), even though "there was no immediate fear that the evidence was in the process of being destroyed or otherwise lost." *Segura*, 468 U.S. at 807 (Burger, C.J., joined by O'Connor, J.).[10]

Similarly, individualized suspicion that the evidence will be destroyed is not required to justify the seizure of evidence in plain view, see *Horton*, 496 U.S. at 136-137, even though the Court has explained that seizure of such evidence without a warrant is reasonable because of the "risk of the item's disappearance." *Place*, 462 U.S. at 701.[11] Nor is a particularized suspicion that a wanted felon will flee necessary to justify a public arrest without a warrant. See *United States* v. *Watson*,

[10] The Court went on to hold that the car could be searched immediately because "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Chambers*, 399 U.S. at 52. The Court noted that the same reasoning would not necessarily support immediate search of a house based on probable cause alone but explained that "there is a constitutional difference between houses and cars." *Ibid.*; see also *Chadwick*, 433 U.S. at 12-13 (noting lesser expectation of privacy in automobiles).

[11] Our rule is thus consistent with the Court's statement in *Place* that temporary seizures do not require a warrant "if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." 462 U.S. at 701. Because there is generally a risk that evidence will be destroyed or tampered with while police officers are seeking a warrant, "the exigencies of the circumstances demand" (*ibid.*) that a seizure based on probable cause be permitted, at least where, as here, the seizure involves no concomitant invasion of privacy. Thus, the Court in *Place* identified the seizure of weapons or contraband in plain view as an example of when the exigencies of the circumstances justify seizure without a warrant even though the Court has not required individualized suspicion that evidence in plain view will be destroyed to support its warrantless seizure.

423 U.S. 411, 423-424 (1976). Rather, "it is recognized that in any felony case the person to be arrested may attempt to flee." *Chimel*, 395 U.S. at 780 (White, J., dissenting, joined by Black, J.) (quoting S. Rep. No. 2464, 81st Cong., 2d Sess. 2 (1950)).

Most to the point, the Court has signaled its approval of the external securing of a dwelling in cases in which there was no particularized reason to believe that evidence would be damaged or destroyed. For example, in *Mincey*, in which the Court approved stationing the guard at the entrance to the apartment, "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant." 437 U.S. at 394. See also *Flippo*, 120 S. Ct. at 8 n.2; *Jeffers*, 342 U.S. at 52. And, in *Segura*, "[a]ll members of the Court appear[ed] to agree that the mere seizure of the premises and contents (that is, a mere interference with possessory interests) is permissible on probable cause *even absent exigent circumstances*." 3 LaFave, *supra*, § 6.5(c) at 366 (emphasis added).

2. Law enforcement would be impeded if police officers were required to develop particularized suspicion that each person whose entry they sought to prevent was likely to tamper with evidence. If there were such a requirement, an officer could not prevent someone's entry into a residence even if the officer had probable cause to believe that the residence contained evidence of a crime, unless he also had specific reason to suspect that the particular person was implicated in the illegal conduct.

Yet entry by an individual whom the evidence does not incriminate may pose a significant (if unknown) risk that evidence will be removed or destroyed. Although such an individual may not have a direct interest in

tampering with the evidence, he may nonetheless be willing to destroy evidence to assist others whom the evidence does incriminate, or even to avoid suspicion being cast on him. His willingness to do so will depend on a wide array of facts that will be difficult for police officers to ascertain, including whether he knows that the evidence exists, whether he knows that the officers are planning to seize it, whether he knows that the evidence is incriminating, whether he knows whom it incriminates, his relationship to the individuals whom it incriminates, and his willingness to obstruct justice in order to aid those individuals.

In this case, for example, respondent's mother arrived at the trailer after a phone conversation with respondent. J.A. 17-18. The police officers could not know whether she was involved in, or even aware of, her son's possession of marijuana. Further, they could not be sure whether respondent had informed her of the events unfolding at the trailer. And the officers could not know whether she was willing to destroy the evidence to protect her son.

A requirement of individualized suspicion not only would impede law enforcement but also would consume judicial resources with litigation over the reasonableness of police judgments in particular cases. The Court has relied on the prospect of such litigation in declining to require an inquiry into individualized suspicion in other Fourth Amendment contexts. See, *e.g.*, *Wyoming* v. *Houghton*, 526 U.S. 295, 305 (1999); *Watson*, 423 U.S. at 423-424. That consideration also supports rejection of a case-by-case inquiry into the danger of evidence tampering here.

D. This Case Involves Neither A Constructive Eviction Nor A Search Without A Warrant Or Consent

The Appellate Court of Illinois held that the police officers violated the Fourth Amendment in this case for two reasons: First, the court concluded that the officers "contructive[ly] evict[ed] [respondent] from his residence" because he was on his front porch when they told him he could not enter his trailer alone while they sought a warrant. Pet. App. 12. Second, the court concluded that the officers conducted an unjustified, warrantless search when an officer accompanied respondent into the trailer while he made telephone calls and obtained cigarettes. *Id.* at 12-13. Both conclusions are incorrect.

1. The appellate court found no evidence that the officers ordered respondent to leave his trailer. Pet. App. 11-12. Nonetheless, because respondent was on the front porch and thus "still on his premises" when the officers prevented his reentry into the trailer, the court determined that the police conduct amounted to a "constructive eviction" of respondent. *Id.* at 12.

That determination was mistaken. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Although, as a matter of property law, respondent's front porch, like the threshold of his trailer and the yard surrounding it, is private, "it is nonetheless clear that under the cases interpreting the Fourth Amendment [respondent] was in a 'public' place." See *Santana*, 427 U.S. at 42. See also 1 LaFave, *supra*, § 2.3(f) at 506-507 ("places visitors could be expected to go (e.g., walkways, driveways, porches)" are not curtilage protected by the Fourth Amendment from intrusion)

(footnotes omitted). Just as the officers in *Santana* did not invade any privacy interest when they sought to arrest the defendant as she stood on her threshold, the officers here did not invade respondent's privacy interests or "constructive[ly] evict[]" him "from his residence" (Pet. App. 12) when they prevented his entry into the trailer from his front porch.

2. The appellate court also erred in concluding that the police officers "secured the dwelling from the inside" and "probably" conducted "an unreasonable search" (Pet. App. 12-13) when an officer accompanied respondent into the trailer while he made telephone calls and obtained cigarettes. The Fourth Amendment's prohibition against warrantless searches does not apply when voluntary consent has been obtained. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). In this case, respondent consented to the officer's entry.

As we have explained, the police officers could constitutionally have denied respondent all access to the trailer, in order to preserve evidence while they obtained a warrant. See pp. 11-19, *supra*. Therefore, the officers could constitutionally condition respondent's access to the trailer on his agreement that an officer could accompany him, because the officer's presence was a reasonable means to neutralize the risk that respondent would destroy evidence if he entered. Cf. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385, 391 (1994) (the government may condition a benefit on the relinquishment of a constitutional right if the waiver of the right is reasonably related to the benefit).

The police officers advised respondent that he could enter the trailer only if he was accompanied by an officer. J.A. 22, 27, 30. By choosing to enter under that reasonable condition, respondent consented to the

officer's entry.[12] Cf. *United States* v. *Rosi*, 27 F.3d 409, 412 (9th Cir. 1994) (by asking the FBI agents who had arrested him for permission to change his clothes and providing them with a key to his condominium, the defendant consented to their accompanying him inside the residence).

CONCLUSION

The judgment of the Appellate Court of Illinois should be reversed.

Respectfully submitted.

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JULY 2000

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[12] When the officer entered the trailer on those occasions, he "just stepp[ed] right inside the door and just stood by the doorway." J.A. 18. He did not "conduct any search while he was in there" (J.A. 30) and therefore did not discover any of the evidence that the police officers found when they later searched the trailer pursuant to the warrant. Thus, even if respondent had not consented to the entry, the Illinois courts should not have excluded the evidence based on that entry, because it was not "the product of illegal governmental activity." *Harris*, 495 U.S. at 19 (quoting *Crews*, 445 U.S. at 471).

Supreme Court, U.S.
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(5)

No. 99-1132

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ILLINOIS,
Petitioner,
v.
CHARLES MCARTHUR,
Respondent.

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, ALASKA, ARIZONA, DELAWARE, IDAHO, IOWA, MAINE, MARYLAND, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, AND WASHINGTON, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF AMICUS INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. While waiting for a warrant, the police may control access to a dwelling – even to the point of denying entry to the owner or occupant – in order to prevent the destruction of evidence 3

1. The need to obtain a warrant to search a dwelling justifies securing the premises to prevent destruction of evidence during the brief time it takes to obtain the warrant 5

2. Fourth Amendment standards furnish fully adequate safeguards against any dangers inhering in temporary warrantless seizures of "effects" or "houses" 10

3. No right to destroy evidence inheres in the concept of ordered liberty 12

B. The officer acted reasonably in initially requesting consent to search 12

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

CASES:

Arkansas v. Sanders, 442 U.S. 753 (1979)..... 4

California v. Acevedo, 500 U.S. 565 (1991)..... 4, 5, 6

City of West Covina v. Perkins, 119 S. Ct. 678 (1999)..... 11

Coolidge v. New Hampshire, 403 U.S. 443 (1971)..... 13

Florida v. Jimeno, 500 U.S. 248 (1991)..... 13

Kansas v. Schur, 538 P.2d 689 (Kan. 1975)..... 14

Mincey v. Arizona, 437 U.S. 385 (1978)..... 6

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)..... 10, 13

Segura v. United States, 468 U.S. 796 (1984)..... 7, 8, 9

United States v. Chadwick, 433 U.S. 1 (1977)..... 4, 5

United States v. Place, 462 U.S. 696 (1983) ...4, 6, 7, 10, 11

Vale v. Louisiana, 399 U.S. 30 (1970)..... 6

Wolf v. Colorado, 338 U.S. 25 (1949)..... 12

CONSTITUTIONAL PROVISION:

U.S. Const., amend. IV..... 4

OTHER AUTHORITY:

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A Treatise On The Fourth Amendment
§6.5(c) (1996 & Supp. 2000)..... 2, 8

STATEMENT OF AMICUS INTEREST

Like Illinois itself, Ohio and the 22 other states joining this brief serve as guardians of public order within their respective jurisdictions, and accordingly share with Illinois an obvious interest in the question presented: namely, when police have probable cause to believe certain contraband is located on particular premises, do they act reasonably under the Fourth Amendment if they secure the premises from the outside and prevent anyone from entering, including the owner or occupant, during the time it takes to obtain the search warrant? This question implicates the basic balance of interests between the State's law enforcement power and the citizen's privacy. Accordingly, the amici States urge a ruling that accords appropriate latitude to the discretion of police officers – a discretion that permits them to enforce the law while respecting the fundamental rights of the citizenry.

SUMMARY OF ARGUMENT

The Fourth Amendment principles at stake here present no study in black-and-white absolutes, but operate in a gray zone that lies at the margins of established doctrine, and that necessitates striking a proper balance between individual liberty and society's interest in law enforcement. *First*, there is the requirement that officers obtain search warrants, which reflects the important constitutional policy that police intrusions be subject to *ex ante* judicial oversight. In this case, that requirement kept the officer from conducting an immediate search that would have uncovered the very drugs and paraphernalia his wife had informed the police about. *Second*, there is the need to prevent destruction of evidence at the scene once police contact has been justifiably initiated. Under these circumstances, the officer chose a less intrusive means: instead of immediate search, or immediate arrest of McArthur, the officer

seized – or "impounded" – the premises. This "impoundment alternative" deserves attention as "a way to deal with the loss-of-evidence risk which does not necessitate, on the one hand, warrantless searches or, on the other, arrest of all those present." 3 W. LaFave, Search and Seizure: A Treatise On The Fourth Amendment §6.5(c), at 361 (1996 & Supp. 2000).

For this reason, the Court should analyze the temporary impoundment of McArthur's domicile under a balancing test that measures the degree of the officer's intrusion upon McArthur's possessory interests against the public need to preserve evidence whenever probable cause supports the belief that contraband is located on the premises. The relatively strong degree of proof possessed by police – here, probable cause rather than mere suspicion – should weigh heavily in favor of the public interest, with one decisive factor being the speed in obtaining and executing a search warrant so as to minimize the duration of the warrantless impoundment.

The amici States also urge that the officer's original request for consent to the search did not offend against any Fourth Amendment principles, even though that request itself may have helped create McArthur's motive to destroy evidence, which in turn constitutes the reason for impounding the premises. Using the request for consent as a factor weighing against the public interest would discourage officers from affording citizens an opportunity to cooperate without formal judicial determination of probable cause – something a citizen might legitimately desire to avoid.

In sum, the amici States ask the Court to acknowledge that, absent a showing of objective bad faith on the part of officers, the existence of probable cause to believe contraband is located on the premises permits a suitably short impoundment of those premises – even securing a domicile against entry by the owner or

occupant – during the time a search warrant is being obtained.

ARGUMENT

A. While waiting for a warrant, the police may control access to a dwelling – even to the point of denying entry to the owner or occupant – in order to prevent the destruction of evidence.

This case involves marijuana and paraphernalia discovered pursuant to a search warrant that issued upon probable cause; that much is not in dispute. Jt. App. 23; Pet. App. 1-2. What the parties contest is a preceding event: during the time the police took to obtain the search warrant, an officer prevented the owner and occupant of the premises, the defendant McArthur, from entering without supervision.

The Illinois Appellate Court described this action as "constructive eviction" of McArthur, Pet. App. 12, and apparently on those grounds plus the officer's entry treated it as an "unreasonable seizure." Pet. App. 13. But the court went on to note the complications in its ruling. Unlike a typical arrest, "[i]t appears that during the time police secured his residence defendant was free to go anywhere in the world except back into this trailer by himself." Pet. App. 14. Accordingly, the court said the "securing of defendant's residence under these circumstances may have included an unreasonable seizure of defendant's person," *id.*, but continued to entertain doubt in that regard. Its conclusion was predicated upon the "constructive eviction" concept and the warrantless intrusion on McArthur's "possessory interests" in his own domicile, see discussion, Pet. App. 4-5 (noting that a "seizure affects an individual's possessory interests while a search affects his privacy interests").

Thus, in spite of some contrary indications, the state court boldly proclaimed its basic finding that the premises, rather than the person, had been seized. We take the appellate court at its word, and we think that view is correct.

By its literal terms, the Fourth Amendment guarantees the "right of the people to be free in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Expressed in the original language, the seizure was not one of McArthur's "person," but rather of his "house." The state court's "constructive eviction" theory focuses on seizure of the "house" while acknowledging as well the ancillary imposition upon the "person." One model for such analysis lies in this Court's decisions dealing, not with "person" or "house" directly, but with "effects," *see United States v. Chadwick*, 433 U.S. 1, 12 (1977) (acknowledging automobiles and luggage are "effects" under Fourth Amendment).

Where the Court has imposed a search-warrant requirement before luggage may be searched, the Court has expressed approval of the temporary impoundment necessary to preserve evidence while the warrant is obtained. *See Chadwick, supra; Arkansas v. Sanders*, 442 U.S. 753 (1979); *cf. California v. Acevedo*, 500 U.S. 565 (1991) (overruling the *Chadwick/Sanders* Court's application of warrant requirement). Indeed, the Court has gone so far as to recognize that reasonable suspicion can, in a proper case, form the basis for a very brief detention of "effects" to facilitate further investigation, *see United States v. Place*, 462 U.S. 696 (1983).

1. The need to obtain a warrant to search a dwelling justifies securing the premises to prevent destruction of evidence during the brief time it takes to obtain the warrant.

Typically, the propriety of seizing items has been discussed in the context of answering the question whether a warrant was required to search. Thus, in *Chadwick*, the Court held that the prerogative to stop and search an automobile without warrant did not extend to searching a locked footlocker within the automobile in the absence of a search warrant pertaining to the locker. In *Sanders*, the Court held that even though a suitcase had been properly seized from the trunk of a car in connection with an arrest given probable cause to believe contraband was contained, no search of it could take place without a warrant. (This result was overruled in *California v. Acevedo*, 500 U.S. 565 (1991), but the logic of permitting impoundment in order to have time to secure a warrant remains the same whenever a warrant is required.)

As the Court applied the search-warrant requirement in those cases, increasing attention was given to the propriety of seizing an item in order to have time to obtain the requisite warrant. In *Chadwick*, the Court noted that "[t]he initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." 433 U.S. at 13. In a footnote, the Court distinguished the interests invaded by seizure as opposed to search: since the defendants' "principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents" the Court opined that a "search of the interior was [] a far greater intrusion into Fourth

Amendment values than the impoundment of the footlocker." *Id.*, n.8.

By the time *Sanders* was decided, the Court's words concerning pre-search impoundment expressed outright approval: "The police acted *properly* – indeed *commendably* – in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marihuana." 442 U.S. at 761 (emphasis added). The judicial commendation for seizing the suitcase arose from the need to secure it until a search warrant was obtained.

Subsequently, the Court has limited the warrant requirement for luggage in a mobile automobile, *see California v. Acevedo*, 500 U.S. 565 (1991), but that does not change the logic of permitting impoundments where a search warrant is required. *See Mincey v. Arizona*, 437 U.S. 385 (1978) (affirming warrant requirement for extensive search of suspect's dwelling in spite of arrest); *Vale v. Louisiana*, 399 U.S. 30 (1970).

Despite its finding against the government on the facts of the case, *United States v. Place*, *supra*, fully supports the basic premise that temporary impoundment can be justified, and in no way impugns the reasonableness of impounding for one to two hours in order to obtain a warrant where police have probable cause. In *Place*, the overriding factor lies in the fact that police acted not upon probable cause, but upon the very much lesser quantum of "reasonable suspicion," 462 U.S. at 701, 702 ("[w]here law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it..." but "[i]n this case, the Government asks us to recognize the reasonableness

under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause...").

Given the low quantum of suspicion in *Place*, the police needed to investigate further to determine whether there would be probable cause. The 90 minute detention of luggage was unreasonable under those circumstances. But that says nothing about the length of time necessary to get a warrant, once the police do possess probable cause – as they did beyond dispute in the present case.

Moreover, the purpose behind making an owner wait before restoring his or her possessory rights has a bearing on the length of time the owner can be asked to wait. In *Place*, the police detained the luggage in order to vindicate the *public interest* in investigating further – they wanted to see if they could establish probable cause, and after that (only if there were probable cause) they could apply for a warrant. But in this case, by contrast, the police already had probable cause, and McArthur suffered a one to two hour interference with his possessory rights so that the police could carry out the constitutional policy of protecting *McArthur's own right* to have a magistrate make an independent ruling on the existence of probable cause.

The cases involving impoundment of luggage set the stage for *Segura v. United States*, 468 U.S. 796 (1984), where the police impounded a dwelling "from the inside" for 19 hours until a search warrant was obtained and executed. In that case, officers arrested one person who jointly occupied an apartment with another. Then, the officers entered the apartment, announced to others there that Segura was under arrest, performed a limited security check, arrested the other occupant, and remained for some 19 hours until a warrant was finally obtained. Execution of the warrant revealed some contraband, which formed a basis for conviction.

Suppression was sought on account of illegal entry and security check. The Court did not review the finding that the entry was illegal, 468 U.S. at 798; nor was review sought of the lower court rulings suppressing the items discovered "in plain view" during the security check, 468 U.S. at 802 n.4. But the Court split on admissibility of evidence discovered pursuant to the search warrant; a 5 to 4 majority declined to view those items as "fruit of a poisonous tree."

Most directly pertinent here is Part IV of Chief Justice Burger's opinion, which was joined by Justice O'Connor. There, Chief Justice Burger opined that "the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant" and that "[w]e see no reason ... why the same principle ... should not apply where a dwelling is involved," 468 U.S. at 806, 810 (opinion of Burger, C.J., joined by O'Connor, J.). The dissenting opinion thought the illegal entry tainted the subsequent searches and would have applied the exclusionary rule more broadly, but the four dissenting Justices endorsed the assumption that "impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside' – when the authorities merely seal off premises pending the issuance of a warrant but do not enter," 468 U.S. at 824 n.15 (opinion of Stevens, J., dissenting, joined by Brennan, Marshall, Blackmun, JJ.). Thus, a majority of Justices (and possibly all the justices, *see* LaFave, *supra*, at 366) appeared to favor an "external impoundment" of the type presented in this case.

That is not surprising given the reasoning of the luggage cases. The pedigree of the *Segura* opinions firmly roots the justification for temporary seizure of "effects" – and by extension "houses" – in the need to preserve evidence without authorizing warrantless searches.

Indeed, the support of the dissenters in *Segura* for the more unqualified pronouncement that impoundment "from the outside" may be justified even "absent exigent circumstances" appears closely associated with their emphasis on the fact that, with an "internal" seizure of a dwelling, not only possessory interests, but also "privacy interests were unreasonably infringed by the agents' prolonged occupation of their home." 468 U.S. at 821-22 (opinion of Stevens, J., dissenting, joined by Brennan, Marshall, Blackmun, JJ.). "External" impoundment, by contrast, in no way constitutes a similar invasion of the private sphere inside the home.

The record in this case shows the officer did enter during the impoundment, but only for the limited purpose of supervising McArthur who had requested permission to enter himself. Jt. App. 22, 26-27, 28. No search was conducted during such entry, and the contraband was subsequently found pursuant to warrant, so that, under the clear holding of *Segura*, no exclusionary rule attached to the fruits of the warranted search. Moreover, to the extent the impoundment itself was reasonable, the officer must have had discretion to condition any entry by McArthur on the amount of supervision that would be necessary to achieve the purpose of the impoundment, i.e. to prevent destruction of evidence. Thus, the Illinois court erred, Pet. App. 12: no "internal" impoundment occurred. The officer did not force entry; he conditionally authorized McArthur's re-entry after effecting a valid "external" impoundment.

To sum up: the warrantless search (and arguably also an "internal" impoundment of premises) invades sacrosanct privacy interests that enjoy Fourth Amendment primacy. By contrast, a brief seizure of items or premises pending issuance of a search warrant effects a lesser intrusion upon merely possessory interests. The Fourth Amendment policies underlying the warrant requirement, therefore, are well served by acknowledging

police discretion to effect a warrantless impoundment, from the outside, of premises during the time it takes to obtain the search warrant.

2. Fourth Amendment standards furnish fully adequate safeguards against any dangers inhering in temporary warrantless seizures of "effects" or "houses."

Two related concerns inhere in a warrantless impoundment. First, the seizure of premises to the point where one may not enter one's own domicile constitutes an intrusion that may be greater or lesser in a given case, and arguably constitutes a more significant intrusion than many situations where, for example, luggage is seized. Second, and closely related, is the effect of coercive police conduct on the homeowner's willingness to consent to a search – the very intrusion of being barred from one's home could conceivably induce a consent to search otherwise not forthcoming. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (when "the State attempts to justify a search on the basis of [] consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied").

The discussion in *Place*, *supra*, allays these concerns. In that case, the Court acknowledged that, subject to the balancing test for reasonableness, brief seizures of items could occur based upon mere reasonable suspicion, 462 U.S. at 706; but the Court held that the bounds of any such police prerogative had been transgressed under the facts of the case. The Court cited two circumstances of particular importance, both of which could also become significant in a given case even if probable cause were present. The first circumstance was the 90 minute duration of the seizure of luggage; that, the

Court found, was simply out of all proportion to the quantum of basis for suspicion and the genuine needs of police investigation. 462 U.S. at 709-10. The second significant circumstance lay in the officers' failure to communicate with the suspect: "[T]he violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and to what arrangements would be made for return of the luggage if investigation dispelled the suspicion." 462 U.S. at 710. *Cf. City of West Covina v. Perkins*, 119 S.Ct. 678, 681-82 (1999) (acknowledging situations in which due process requires individualized notice of seizure).

Both the durational standard and the communication element potentially shield citizens against police abuse of a power to effect warrantless impoundments. Here, the police acted not upon mere reasonable suspicion, but upon probable cause, and nothing in the record indicates the one to two hours during which the warrant was procured should by itself be deemed unreasonable. Nor does the record whisper any suggestion that the impoundment was abused by officers; in particular, the officers did not use it to extract a consent for the search, or to inflict any detriment upon McArthur beyond the wait necessary to obtain the warrant. Thus, the present case presents neither a hypothetical situation where police delay in getting a warrant to prolong the intrusive character of impoundment; nor one where police lie about the status of the warrant application, or omit to tell a suspect that a warrant application has been delayed or denied.

Such ancillary Fourth Amendment standards fully suffice to guard against any police abuse of a power to impound.

3. No right to destroy evidence inheres in the concept of ordered liberty.

Nor should the Court lose sight of the anomaly in McArthur's claim, which goes like this: "Because I would have destroyed the evidence if permitted to enter alone, Jt. App. 27, that evidence would never have been discovered pursuant to the search warrant; therefore, the evidence, having been preserved by the officer's impoundment of the premises, should now be suppressed." The Court should reject this assertion.

The Fourth Amendment to the U.S. Constitution articulates rights which this Court has held to be incorporated into the due process guarantee set forth in Section 1 of the Fourteenth Amendment: "The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

Given the strictures of the warrant requirement, officers will in the absence of a power to impound, lack reasonable power to prevent the destruction of evidence. We respectfully submit that such a doctrine in no way inheres in the concept of ordered liberty, and therefore cannot properly be enforced against the States under the Fourteenth Amendment incorporation doctrine.

B. The officer acted reasonably in initially requesting consent to search.

Although the testimony is not clear, a plausible reading indicates McArthur may not have been aware that his wife informed police concerning his possession of

marijuana until the officer told him so and requested consent to search. Jt. App. 26. If that is correct, then the officer may have alerted McArthur and helped create the motive to destroy evidence. Jt. App. 16, 26. Such a reading of the record raises a potential concern that the officer helped create the very circumstance that justified the impoundment. But that concern does not justify ruling the impoundment unconstitutional, because that would, in effect, deprive police of discretion to request consent.

Not only has the Court identified no constitutional policy that disfavors consent, the Court has endorsed consent searches. "[I]n those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable," and "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution a prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 243 (1973); cited with approval in *Florida v. Jimeno*, 500 U.S. 248, 252 (1991); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) ("nothing constitutionally suspect in the existence, without more, of [] incentives to full disclosure or active cooperation with the police"). Nor is consent always a detriment to the suspect, who may find a "search pursuant to consent" involves "considerably less inconvenience," because "[i]f a search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified." *Schneckloth*, 412 U.S. at 228.

Here again, the power to impound must be considered in light of the strong and vital rule that police should obtain warrants before undertaking a Fourth

Amendment search. Should the exigency created by an officer's requesting consent justify a warrantless search? The obvious danger is complete vitiation of the warrant requirement, *see*, *Kansas v. Schur*, 538 P.2d 689 (Kan. 1975) (where prosecution predicated claim of "exigent circumstances" upon defendant's negative response to officer's request for consent, court concluded that "if any exigency existed it was created by the acts of the officer"). Temporary impoundment, by contrast, preserves both the warrant requirement and the interest of both suspect and society in consent searches.

CONCLUSION

For all the foregoing reasons, the decision of the Illinois Appellate Court should be reversed.

Respectfully submitted,

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NO. 99-1132

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ILLINOIS,
Petitioner,

v.

CHARLES MCARTHUR,
Respondent.

On Writ of Certiorari to the
Appellate Court of Illinois, Fourth District

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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August 14, 2000

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Is it reasonable under the Fourth Amendment for police officers who have probable cause to believe that a residence contains evidence that could readily be destroyed to secure the residence by preventing its occupant and others from entering unaccompanied while the officers seek a search warrant?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION 1

SUMMARY OF ARGUMENTS 3

ARGUMENT 4

I. The State of Illinois Seeks an Unwarranted and Dangerous Exception to the Warrant and Probable Cause Requirement to Permit Police to Subject Personal Residences to Investigative Detainment Pending the Issuance of a Warrant 4

II. Permitting Police to Seize a Personal Residence on the Basis of an Assumption that Probable Cause Exists and that a Warrant Will be Issued Invites an Unprecedented Expansion of Police Power that Will Inevitably be Abused 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Adams v. Williams, 407 U.S. 143 (1972) 11

Agnello v. United States, 269 U.S. 20 (1925) 6

Arkansas Educational Television Comm'n. v. Forbes, 523 U.S. 666 (1998) 2

California v. Acevedo, 500 U.S. 565 (1991) 9

Cardwell v. Lewis, 417 U.S. 583 (1974) 9

Carroll v. United States, 267 U.S. 132 (1925) 9

Chambers v. Maroney, 399 U.S. 42 (1970) 9

Chimel v. California, 395 U.S. 752 (1969) 10

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 3, 6, 8, 9

Ferguson v. City of Charleston, S.Ct. No. 99-0936 2

Florida v. J.L., 120 S.Ct. 1375 (2000) 2

Frazee v. Dept. of Employment Sec., 489 U.S. 829 (1989) 2

Illinois v. Wardlow, 120 S.Ct. 673 (2000) 2

Indianapolis v. Edmond, S.Ct. No. 99-1030 2

Johnson v. United States, 333 U.S. 10 (1948) 6, 10, 12

Jones v. United States, 357 U.S. 493 (1958) 6

McDonald v. United States, 335 U.S. 451 (1948) 10

Mincey v. Arizona, 437 U.S. 385 (1978) 10

Payton v. New York, 445 U.S. 573 (1980) 5-8

People v. McArthur, 304 Ill.App.3d 395, 713 N.E.2d 93 (4th Dist. 1999) 13

Segura v. United States, 486 U.S. 796 (1984) 4

Semayne's Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a 5

Slack v. McDaniel, 120 S.Ct. 1595 (2000) 2

Steagald v. United States, 451 U.S. 204 (1981) 6, 13

Terry v. Ohio, 392 U.S. 1 (1968) 11

United States v. Place, 462 U.S. 696 (1983) 8

United States v. United States District Court, 407 U.S. 297 (1972) 5

Vale v. Louisiana, 399 U.S. 30 (1970) 10

Wilson v. Layne, 526 U.S. 603 (1999) 5

Wyoming v. Houghton, 526 U.S. 295 (1999) 2

Statutes and Constitutional Provisions

U.S. Constitution Amend. IV . . . . . *passim*

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of certiorari in the United States Supreme Court in more than two dozen cases, and certiorari has been accepted in two important First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed amicus curiae briefs in many significant Supreme Court cases, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), *Illinois v. Wardlow*, 120 S.Ct. 673 (2000), *Florida v. J.L.*, 120 S.Ct. 1375 (2000), *Indianapolis v. Edmond*, 99-1030 (oral argument October 3, 2000) and *Ferguson v. City of Charleston*, S.Ct. No. 99-0936 (oral argument October 4, 2000), and have also filed a multitude of amicus curiae briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including

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1 *Amicus curiae* The Rutherford Institute files this brief with consent from both parties. Counsel for The Rutherford Institute authored this brief in its entirety, with able assistance from law clerk Margaret W. Ng'ang'a (*J.D.* 2000, Louisiana State Univ. School of Law). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The Rutherford Institute is participating in *State of Illinois v. McArthur* as an *amicus* of the Court because it believes the Petitioner is seeking an unreasonable expansion of police authority that is diametrically opposed to historic protections afforded the homes of citizens by the Fourth Amendment. While certainly government at all levels, as well as the public as a whole, has a vested interest in the eradication of illegal drugs, it is the judiciary's province and duty to ensure that the constitutionally guaranteed rights of private citizens are not run roughshod in the rush to win the "war on drugs." In the words of Justice Stewart in *Coolidge v. New Hampshire*:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won -- by legal and constitutional means in England, and by revolution on this continent -- a right of personal security against arbitrary intrusions by official power.

403 U.S. 443, at 455 (1971) (plurality opinion).

The issue squarely before the Court in this case is whether, in view of the time-honored protections afforded citizens' private residences by the Fourth Amendment, the

Court will now countenance the securing by police of a home against its residents for an indefinite period of time, on the mere presumption that they will be able to obtain a warrant on probable cause to search the interior. The Court's amicus submits that such a practice is virtually indistinguishable from an occupation of the home itself by police authorities, since in either event the resident is deprived of the dominion and enjoyment of his home. Like warrantless searches for persons or things within a residence absent exigent circumstances, which have repeatedly been condemned by the Court whether or not probable cause was shown to have existed, the practice of securing a home against its residents should also be condemned as fundamentally incompatible with the Fourth Amendment.

SUMMARY OF ARGUMENT

By securing Respondent's home and prohibiting him entry unaccompanied by police officers, the police effectively "seized" the home within the meaning of the Fourth Amendment. The seizure in question was per se unreasonable under the Fourth Amendment, since no exigency existed that necessitated securing the home pending the issuance of the warrant.

This case is clearly distinguishable from *Segura v. United States*, 486 U.S. 796 (1984), in which the Court upheld against a Fourth Amendment challenge the securing of premises from the outside pending the issuance of a search warrant. Where, as here, the homeowner's possessory interest in his home was denied for a substantial period of time absent a warrant or exigent circumstances, *Segura* actually counsels against the admissibility of evidence seized as a result of the seizure.

ARGUMENT

I. The State of Illinois Seeks an Unwarranted and Dangerous Exception to the Warrant and Probable Cause Requirement to Permit Police to Subject Personal Residences to Investigative Detainment Pending the Issuance of a Warrant.

The Fourth Amendment to the United States Constitution affirms and safeguards, inter alia, "[t]he right of the people to be secure in their persons [and] houses ... against unreasonable searches and seizures." As the Court has observed on numerous occasions, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 586 (1980); *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

The homes of citizens enjoy a virtually sacrosanct position in English and American law. The Supreme Court recently harkened back to this principle in *Wilson v. Layne*, 526 U.S. 603, 610 (1999), in which it unanimously held the practice of media "ride-alongs" to film the execution of warrants in residences as violative of the Fourth Amendment. The Court quoted *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195, an English case dating back to 1604 which made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." In fact, "[t]he zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." *Payton*, 445 U.S. at 596-97.

The crux of this ancient principle lies in the consistent application of the often-stated rule that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586 (citations omitted). While the Amendment does not establish a warrant requirement for all seizures,

> [I]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Steagald v. United States, 451 U.S. 204, 211 (1981), quoting *Payton v. New York*, 445 U.S. at 590. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475, 477-478 (1971); *Jones* v. *United States*, 357 U.S. 493, 497-498 (1958); *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1925); *Johnson* v. United States, 333 U.S. 10, 13-15 (1948). The Court's most familiar articulation of this rule is found in *Coolidge v. New Hampshire*:

> It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances."

403 U.S. at 474-75.

In view of this principle, the Court in *Payton* declared unconstitutional a New York statute that permitted police to search for and arrest a suspect in his own residence without a search warrant, where they possessed probable cause to arrest:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined "exigent circumstances."

403 U.S. at 474-475, 477-478.

Significantly for the present case, this presumption against the constitutionality of warrantless searches within a residence applies to searches for things as well as persons, and regardless of whether probable cause exists to search for the items. The Court has characterized it as a "long-settled premise" that "absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Payton*, at 587-88; see also id. at 588, n. 27 (approving lower court's reasoning that "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.")

The rule against warrantless seizures of personal

property is informed by very similar principles. The Supreme Court in *United States v. Place*, 462 U.S. 696 (1983), held that a police detention of a passenger's luggage for ninety minutes in order to procure a canine sniff of the contents for drugs was an unreasonable deprivation of the individual's "liberty interest in proceeding with his itinerary," which also is protected by the Fourth Amendment. 462 U.S. at 708-710. Place affirmed the constitutional importance of ensuring the integrity of possessions against unreasonably lengthy seizures. In Respondent's case, the "possessions" in question -- a suspect's own home and all of his personal belongings -- carry a much more compelling expectation of privacy than the luggage in *Place*. If in *Place*, a ninety-minute detention of luggage was held unreasonable, then surely a seizure of a person's home for the same or longer period of time must also be deemed unreasonable. The Fourth Amendment standard for protection for movable personal property should not be read to afford greater protection than that given real property.

The rule for vehicle seizures, though somewhat more flexible, is animated by the same rationale as that for baggage seizures. The Court's decision in *Coolidge v. New Hampshire*, supra, held that on the facts of that case, a warrantless search and seizure of the vehicle in question could not be justified under the any of the "few specifically established and well-defined exceptions" to the warrant requirement. 403 U.S. at 455. *Coolidge* established that even an automobile may not be subjected to a warrantless search and seizure based upon probable cause, if it is stationary and the exigency rationale underlying the so-called "car search exception" is therefore inapplicable. The "exigent circumstances" rationale of *Carroll v. United States*, 267 U.S. 132 (1925), that in the case of automobiles "it is not practicable to secure a warrant because

the vehicle can be moved quickly out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153, survives the Court's holding in *California v. Acevedo*, 500 U.S. 565 (1991). *Acevedo* merely clarified *Carroll* "as providing one rule to govern all automobile searches," that is, that "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." 500 U.S. at 580. *Acevedo* did not undercut the rationale of *Carroll*; in fact, it paid due respect to it, stating that "[the Court] therefore held [in *Carroll*] that a warrantless search of an automobile, based upon probable cause ... in the light of an exigency arising out of the likely disappearance of the vehicle, did not contravene the Warrant Clause...." *Acevedo*, 500 U.S. at 569 (emphasis added). The exigent circumstances rationale of *Carroll* has been consistently stressed by the Court. See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970) (existence of exigent circumstances to be determined at the time automobile is seized); *Coolidge v. New Hampshire*, 403 U.S. 443 (no exigent circumstances pertained where vehicle was parked on defendant's private driveway and police had known of its location there); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (citing exigent circumstances justifying impoundment of suspect's vehicle and distinguishing *Coolidge*).

Likewise, although the Court has previously found the warrant requirement of the Fourth Amendment inapplicable in cases where the "'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment," *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)), the facts in this case do not show the existence of exigent circumstances sufficient to

justify the deprivation of Respondent's right to dominion over his home. The Court in *Vale v. Louisiana*, 399 U.S. 30 (1970), indicated that a warrantless search of premises, even one not incident to an arrest, might be permitted where evidence was "in the process of destruction." The *Vale* Court did not allow the warrantless search where there was merely a possibility of the evidence being destroyed; it required the state to demonstrate, in essence, that destruction of the contraband was imminent and threatened. 399 U.S. at 34. See also *Chimel v. California*, 395 U.S. 752 (1969) (rejecting argument that suspect's wife, who was at home at time of his arrest and could have destroyed evidence of theft before warrant was obtained, justified "exigent circumstances" exception); *Johnson v. United States*, 333 U.S. 10 (1948) (rejecting state's contention that exigent circumstances existed on the basis of fumes emanating from hotel room). Further, the State of Illinois cannot demonstrate that procuring a warrant would be "impractical" under the circumstances, as the Court's decisions require. *Chimel*, 395 U.S. at 768; *Vale*, 399 U.S. at 35. To the contrary, their actions demonstrated the opposite, since they obtained a warrant as a matter of course within several hours.

Even if it can reasonably be contended that an exigency existed in the circumstances presented here, the "exigency" -- the presumption that Respondent would attempt to destroy the contraband before a warrant could be obtained -- was created by the officers themselves, and therefore cannot be relied upon as a justification for the warrantless seizure of Respondent's property. The officers created the exigency by calling the defendant out and informing him that they had information about the presence of drugs inside the house. The Respondent then exercised his constitutional right not to have his privacy violated by a warrantless search by refusing to give his consent.

Had the officers simply staked the residence out while obtaining a warrant, the deprivation of Respondent's dominion and enjoyment of his home engendered by the seizure would not have been necessary. In the event Respondent had left his residence, the officers could have simply subjected him to a *Terry*-style "pat-down" search to ensure that he had not removed the contraband from the home. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143 (1972) (extending *Terry* stop to possessory offenses). Such an intrusion, though not insubstantial, would certainly have been less of a burden on Respondent's privacy and the sanctity of his home than the lengthy lockout they decided to impose.

II. Permitting Police to Seize a Personal Residence on the Basis of an Assumption that Probable Cause Exists and that a Warrant Will be Issued Invites an Unprecedented Expansion of Police Power that Will Inevitably be Abused.

The police should not be allowed to argue ex post facto that the Fourth Amendment violation was cured by securing a warrant. The constitutional violation should be assessed at the time of the seizure, for two reasons that are at the heart of Fourth Amendment jurisprudence. First, the "reasonableness" of the length of the detainment cannot be assessed ex ante, since the duration of the lockdown is indeterminate until the warrant is issued. The duration of such a lockdown is not in the hands of police officers, which would mitigate the burdensomeness somewhat; it is subject to the actions of third persons, such as magistrates, court personnel, and other third parties necessary to assist in the warrant process. This crucial distinction militates strongly against granting officers authority to seize a residence pending issuance of a warrant, since even if police do

not intend to abuse it, the use of such authority would invariably become unreasonable in many cases, and once the duration becomes unreasonable, the unconstitutional deprivation of the citizen's rights cannot be cured.

Second, and perhaps more importantly, such authority would almost certainly be abused. Officers would have virtually no incentive to gauge the existence of probable cause carefully before they secure a residence, since in many cases the mere act of doing so will force a naive householder to resign himself or herself to the search and give in with "consent." Further, the possession of the authority to "lock down" residences inevitably creates an adverse risk of its abuse in the very nature of the often heated and tense exercise of law enforcement. As Justice Jackson warned, writing for the Court in *Johnson v. United States*, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police

officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Similarly, the Court cautioned in *Steagald*, *supra*:

> The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this checkpoint between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home.

451 U.S. at 212-13 (citations omitted). "[E]xisting remedies" for such abuse, the Court warned, "such as motions to suppress illegally procured evidence and damages actions for Fourth Amendment violations," do not provide adequate means of redress. 451 U.S. at 21.

> Indeed, if suppression motions and damages actions were sufficient to implement the Fourth Amendment's prohibition against unreasonable searches and seizures, there would be no need for the constitutional requirement that in the absence of exigent

> circumstances a warrant must be obtained for a home arrest or a search of a home for objects. We have instead concluded that in such cases the participation of a detached magistrate in the probable-cause determination is an essential element of a reasonable search or seizure ....

Id. at 215-16.

CONCLUSION

The Court's *amicus* respectfully submits that the Illinois appellate court was correct in finding that there was a "constructive eviction" of Respondent by the police in the two hours pending the issuance of a search warrant. *People v. McArthur*, 304 Ill.App.3d 395, 402, 713 N.E.2d 93, 98 (4th Dist. 1999). The court consequently held correctly that the police conduct in securing Respondent's residence while awaiting a search warrant was an unreasonable seizure under the Fourth Amendment, and that the evidence obtained thereby was properly suppressed.

The Court has never sanctioned and should not sanction now police lockdowns of citizens' residences without a warrant or exigent circumstances. The idea that the police possess the authority to lock down homes on the mere assumption that they will be able to obtain a warrant on probable cause rewards poor police work. More than that, it strikes at the heart of the Fourth Amendment, which has from time immemorial been interpreted to intend that the threshold of a citizen's home is one of the most important barriers against tyranny. The Court's *amicus* urges the Court to bear in mind the words of Pitt's address in

the House of Commons in March 1763, which, as the Court has noted, "echoed and re-echoed throughout the Colonies" at the time of the framing of the Fourth Amendment:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter -- all his force dares not cross the threshold of the ruined tenement![2]

For the compelling reasons set forth herein, The Rutherford Institute respectfully contends that the judgment of the Court of Appeals, upholding the trial court's suppression of the evidence seized from Respondent's home, should be affirmed.

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2 *Payton*, 445 U.S. at 601, n. 54, quoting *Miller v. United States*, 357 U.S. 301, 307 (1958).

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IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE IMPOUNDMENT ALTERNATIVE CANNOT BE WITHOUT LIMITS 5

II. THE POLICE CONDUCT IN THIS CASE REPRESENTED AN INTRUSION INTO MR. MCARTHUR'S PRIVACY INTERESTS 7

III. THIS INTRUSION WAS NOT JUSTIFIED BY ANY EXIGENT CIRCUMSTANCES 10

IV. PERMITTING THE POLICE CONDUCT IN THIS CASE WOULD BE CONTRARY TO PUBLIC POLICY, AS IT WOULD CONDONE SERIOUS INVASIONS OF PRIVACY AT MINIMAL BENEFIT TO LAW ENFORCEMENT 14

CONCLUSION 18

TABLE OF AUTHORITIES

CASES PAGE(S)

Arkansas v. Sanders, 442 U.S. 753 (1979) 12

Chambers v. Maroney, 399 U.S. 42 (1970) 9, 10

Chimel v. California, 395 U.S. 752 (1969) 7, 8, 9

Gouled v. United States, 255 U.S. 298 (1921) 6

Maryland v. Wilson, 519 U.S. 385 (1978) 7

Mincey v. Arizona, 437 U.S. 385 (1978) 10, 11, 12

Payton v. New York, 445 U.S. 573 (1980) 15

People v. Clements, 339 N.E.2d 170 (N.Y. 1975) 17

People v. McArthur, 713 N.E.2d 93 (Ill.App.Ct.) *appeal denied*, 720 N.E.2d 1101 (Ill. 1999), *cert. granted*, 20 S. Ct. 1830 (2000) 2, 3, 6

People v. Smith, 496 P.2d 1261 (Cal. 1972) 13

Segura v. United States, 468 U.S. 796 (1984) .. 4, 5, 6, 8, 9, 10, 11, 12, 13

Sheik-Abdi v. McClellan, 37 F.3d 1240 (7th Cir. 1994) 15

Terry v. Ohio, 392 U.S. 1 (1968) 10

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) ... 17

United States v. Jeffers, 342 U.S. 48 (1951) 12

United States v. Karo, 468 U.S. 705 (1984) 8, 12

United States v. Place, 462 U.S. 696 (1983) 10, 11

United States v. Thompson, 700 F.2d 944 (5th Cir. 1983) 13

Vale v. Louisiana, 399 U.S. 30 (1970) 7, 8, 9, 13

Welsh v. Wisconsin, 466 U.S. 740 (1984) 14

Wong Sun v. United States, 371 U.S. 471 (1963) 6

STATUTES PAGE(S)

720 Ill. Comp. Stat. Ann. 600/3.5(a), 550/4(a) (West 1993 & Supp. 2000) 2

OTHER AUTHORITIES PAGE(S)

3 Wayne R. LaFave, *Search and Seizure*, §6.5(c) (3d ed. 1996) 8, 11, 15, 17

INTEREST OF THE *AMICUS*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is the promotion of the proper administration of justice.

STATEMENT OF THE CASE

On April 2, 1997, two Sullivan, Illinois police officers accompanied Tera McArthur to retrieve belongings from the trailer she shared with her estranged husband, Respondent Charles McArthur. Pet. App. 2. Officers Love and Skidis waited on the porch while Mrs. McArthur removed her property. Pet. App. 2. When Mrs. McArthur emerged from the trailer, she informed Officer Love that the Respondent had "pot" in the trailer under the couch. Officer Love knocked on the door and, when Mr.

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1 The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

McArthur answered, Officer Love told the Respondent that his wife had alleged the presence of drugs in the trailer. The defendant denied the allegation and also denied the officer's request to search the residence without a warrant. By the end of this exchange, Mr. McArthur was standing on the porch. However, Officer Love cannot recall whether Mr. McArthur emerged voluntarily or whether Officer Love ordered Mr. McArthur out of his home. *See People v. McArthur*, 713 N.E.2d 93, 94 (Ill. App. Ct.) *appeal denied*, 720 N.E.2d 1101 (Ill. 1999), *cert. granted*, 20 S. Ct. 1830 (2000).

Mr. McArthur has testified that he overheard Officer Love and Mrs. McArthur talking about getting a search warrant and about Mrs. McArthur testifying. Eventually, Officer Skidis accompanied Mrs. McArthur to testify before a magistrate, and Officer Love approached Mr. McArthur to tell him "what was happening." *See id.* at 94. From that point on, Officer Love did not allow Mr. McArthur into his home except to retrieve cigarettes and make telephone calls. When Mr. McArthur did enter his home, Officer Love accompanied him and observed him at all times. This observation lasted between one and two hours. At no time was Mr. McArthur informed whether or not he was in custody. *See id.* at 94-95.

When the police returned with a warrant, they entered the trailer and Mr. McArthur voluntarily showed the officers the location of the drugs. Mr. McArthur was arrested and charged with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of a substance containing less than 2.5 grams of cannabis. *See* 720 Ill. Comp. Stat. Ann. 600/3.5(a), 550/4 (a) (West 1993 & Supp. 2000). Mr. McArthur has testified that he would have destroyed the marijuana that was in his home had he ever been allowed to reenter his residence alone. *See McArthur*, 713 N.E.2d at 94.

At trial, Mr. McArthur moved to suppress the evidence found in his residence pursuant to the warranted search, arguing that his Fourth Amendment rights were violated because of the police seizure and search of his residence during the two hours it took to secure the search warrant. The trial court granted the motion to suppress. *See id.* Petitioners appealed and the Fourth District appellate court affirmed. *See id.* The Fourth District appellate court held that police execute an unreasonable search and seizure when they limit "'the freedom of movement of persons within, into or out of'" secured premises, unless those persons are already in custody, are subject to arrest when they appear, or have consented to remain outside. *Id.* at 96 (citation omitted).

SUMMARY OF ARGUMENT

When police have probable cause to believe a dwelling contains incriminating evidence, they face the possibility that such evidence will be destroyed in the time it takes to obtain a search warrant. Recently, however, impoundment of a defendant's premises has emerged as a potentially less intrusive method of preserving evidence than an immediate and warrantless search. While this Court has approved certain types of impoundment, it has not yet authorized police to impound private dwellings that remain *occupied*, and to control the occupants' movement into and out of their dwelling.

The Fourth Amendment demands that this Court exercise extra caution in delineating the parameters of this "impoundment alternative." This requires an examination of whether impoundment intrudes upon the privacy interests of the defendant, and if so, whether the impoundment was conducted under exigent circumstances. The NACDL submits that impoundment of occupied private premises constitutes an invasion of privacy and, as such, *is only constitutionally reasonable when circumstances are*

exigent, and where the alternative methods of preventing the destruction of evidence are more intrusive than impoundment itself.

In this case, the conduct of the police represented a substantial intrusion into Mr. McArthur's privacy interests. Unlike *Segura v. United States*, 468 U.S. 796 (1984) in which this Court approved a warrantless internal securing of an unoccupied premises while the residents were in custody, the hallmark of this case is that Mr. McArthur was at home while the alleged search and seizure took place. And yet, at the heart of the Fourth Amendment is the belief that privacy interests, especially when the defendant is at home, deserve the strongest protection from state intrusion. Whether the impoundment in this case is deemed a "search" or a "seizure," it deserves such protection.

Under the Fourth Amendment, impoundment that interferes with a defendant's privacy interests has rarely been permitted absent exigent circumstances. In this case, no greater than a theoretical risk of evidence destruction existed until the police unnecessarily asked the defendant if they could search his trailer. Moreover, appellate courts have held that police cannot, through their own conduct, create exigent circumstances justifying a warrantless entry where none otherwise existed.

Permitting the police conduct in this case would condone substantial invasions of privacy at minimal benefit to law enforcement. In this case, Officers Love and Skidis had at least three alternatives to impounding Mr. McArthur's premises and possibly seizing his person. Before the police created the exigent circumstances that supposedly necessitated their impoundment of Mr. McArthur's premises, they could easily have obtained a search warrant on the strength of Mrs. McArthur's testimony before a magistrate. Alternatively, the police could have arrested Mr. McArthur and apprised him of his Miranda rights either before or after they created exigent circumstances. After the police created

the exigent circumstances justifying impoundment, they might have performed an immediate but warrantless search of Mr. McArthur's trailer.

Investigative procedures employed by the police should be the least intrusive means reasonably available to verify or dispel the officer's suspicion. By choosing impoundment in the face of less intrusive alternatives, the police demonstrated their indifference to Mr. McArthur's privacy interests and thereby struck an unreasonable balance between the interests of law enforcement and the constitutional rights of an alleged criminal.

ARGUMENT

I. THE IMPOUNDMENT ALTERNATIVE CANNOT BE WITHOUT LIMITS

When police have probable cause to believe a dwelling contains incriminating evidence, they face the possibility that such evidence will be destroyed in the time it takes to obtain a search warrant. Courts have approved several methods of circumventing this problem, such as arresting the occupants of the residence and searching incident to arrest, obtaining the occupants' consent to search, and in some cases conducting a search without a warrant. Most recently, impoundment of a defendant's premises has emerged as a potentially less intrusive alternative to warrantless search and arrest.

In defining the contours of the "impoundment alternative," this Court has held that police may impound a residence from the outside even absent exigent circumstances, and may secure a residence from the inside when the person otherwise claiming a privacy interest is in custody. *See Segura*, 468 U.S. 796 (1984). However, this Court has not yet authorized police to impound residences that remain occupied, and to control the occupants'

movement into and out of the residence. Such conduct was not addressed in *Segura*, and was deemed constitutionally unreasonable by the Illinois Appellate Court in this case. *See McArthur*, 713 N.E.2d at 98.

The impoundment of occupied premises does not fit neatly into the traditional categories of Fourth Amendment case law. However, its use does not dictate a diminution in the deference to privacy and possessory interests that the Fourth Amendment protects. Rather, this Court should exercise extra caution in delineating the parameters of permissible police conduct in cases of impoundment. The Fourth Amendment demands that the right to privacy be guarded with the greatest caution "so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." *Gouled v. United States*, 255 U.S. 298, 304 (1921).

Warrantless impoundment of occupied premises represents a real invasion into the privacy interests of the occupants, often at minimal benefit to law enforcement. Whether deemed a "search" or a "seizure," such conduct *is only constitutionally reasonable when circumstances are exigent, and where the alternative methods of preventing the destruction of evidence are more intrusive than impoundment itself.* The NACDL believes that the police conduct in this case struck the wrong balance between the privacy of the defendant and the interest of law enforcement.[2]

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[2] The link between the unreasonable police action and the discovery of the evidence is clear in this case. Mr. McArthur has testified that were it not for the police's constant surveillance, he would have destroyed the evidence in his trailer. Clearly, this qualifies the evidence as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

II. THE POLICE CONDUCT IN THIS CASE REPRESENTED AN INTRUSION INTO MR. MCARTHUR'S PRIVACY INTERESTS

1. Privacy interests, especially when the defendant is at home, deserve the strongest protection of the Fourth Amendment.

The reasonableness of a search or seizure is determined by balancing the government's law enforcement interests against any intrusion on the defendant's Fourth Amendment rights. *Maryland v. Wilson*, 519 U.S. 408, 411 (1997). Thus, while this Court has recognized a strong law enforcement interest in protecting incriminating evidence from destruction, this interest has been balanced against the possessory and privacy interests of individual defendants. The police conduct in this case implicated Mr. McArthur's privacy interests, which deserve the strongest protection of the Fourth Amendment.

Cases decided by this Court have confirmed the necessity of protecting privacy interests in the context of drug investigations – particularly when a private dwelling is involved. In *Chimel v. California*, 395 U.S. 752, 763 (1969), this Court limited the area that police may search incident to a lawful arrest to "the area from within which he might gain possession of a weapon or destructible evidence." The next term, in *Vale v. Louisiana*, 399 U.S. 30, 33-34 (1970) this Court held that a lawful arrest on the street outside a defendant's dwelling does not justify the warrantless search of the defendant's dwelling as incident to lawful arrest or under exigent circumstances.

At the heart of *Chimel* and *Vale* is the belief that privacy interests, especially when the defendant is at home, deserve the strongest protection of the Fourth Amendment. Though the home has long been recognized as the most impenetrable bastion of

privacy, where "the individual normally expects privacy free of governmental intrusion." *United States v. Karo*, 468 U.S. 705, 714 (1984), *Chimel* and *Vale* make it even more clear that, even in cases where there is a substantial state interest in procuring evidence, the home must remain free from unreasonable intrusion.

2. By keeping Mr. McArthur under watch in his home while obtaining a search warrant, the police intruded upon his privacy interests.

In *Segura*, 468 U.S. at 813, this Court took note of the difference in conduct leading to invasions of privacy, as opposed to possessory, interests. Although *Segura* also dealt with a case of impoundment, the critical difference between *Segura* and the case at hand is the presence of the defendant in the home while the impoundment took place. For this Court, in *Segura*, the defendants' absence during an internal impoundment of their residence vitiated any intrusion into their privacy interests. In this case, however, Mr. McArthur's private actions in his home were observed, and his personal belongings viewed without permission, for extended periods of time. It is intuitive that such intrusive police presence constitutes a gross invasion of Mr. McArthur's privacy interests.

Indeed, Professor LaFave has stated that the practice of keeping a defendant under watch while police obtain a warrant is even "more intrusive" than mere impoundment of a defendant's premises. 3 Wayne R. LaFave, *Search and Seizure*, §6.5(c), at 367 (3d ed. 1996). Though petitioners argue that the police action in this case constituted only an infringement of possessory interests, there was in fact a palpable violation of Mr. McArthur's privacy. The nature of this violation is captured by the dissenters in *Segura*, who observed that

> [e]ven assuming the most innocent of motives, the agents' occupation of petitioners' living quarters inevitably involved scrutiny of a variety of personal effects throughout the apartment. Petitioners' privacy interests were unreasonably infringed . . . .

468 U.S. at 821 (Stevens, J., dissenting) (footnote omitted). In this case, Mr. McArthur's home was under internal observation on repeated occasions over a two hour period. His personal effects were open to scrutiny, and his behavior in his own home was open to unrestricted viewing by Officer Love, despite the fact that Mr. McArthur had not been informed that he was under arrest, and had already stated that Officer Love did not have permission to enter his home.

3. The police conduct in this case is thus unreasonable whether it is analyzed as a search or as a seizure.

Because *Chimel* and *Vale* reemphasize the status of the home as a place of special deference to privacy interests, subsequent cases have sought to draw a distinction between the significance of privacy versus possessory interests. As cases like *Segura* have shown, there is indeed a difference in the nature of the conduct giving rise to possessory and privacy violations. However, the Court's decision in *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) suggests that there is no difference between the severity of an unreasonable "seizure" and an unreasonable "search."

In *Chambers*, this Court held that, given probable cause, there was no constitutional difference between seizing a car and waiting on a warrant and doing an immediate warrantless search of the car. The court reasoned that since there was a right to search the car on the highway, moving it to headquarters would have made

little practical difference. In this way, the *Chambers* Court envisioned no difference in the Fourth Amendment implications of a search and those of a seizure. If a seizure had been less volatile than a search, the *Chambers* Court would have required that the police seize the car and wait for a warrant rather than doing a warrantless search. By analogy, the constitutional analysis in the instant case hinges on the fact that Mr. McArthur's *privacy* interests were abridged by an enforced dispossession of his home, regardless of whether this dispossession is analyzed as a search or as a seizure.

III. THIS INTRUSION WAS NOT JUSTIFIED BY ANY EXIGENT CIRCUMSTANCES

1. Under the Fourth Amendment, impoundment that interferes with a defendant's privacy interests has rarely been permitted absent exigent circumstances.

In *Terry v. Ohio*, 392 U.S. 1, 26 (1968), this Court required that warrantless police action be "strictly circumscribed by the exigencies which justify its initiation." While it is true that this Court has occasionally approved of temporary seizures based on probable cause alone, these cases have involved actions that did not implicate privacy interests. For example, the case of *United States v. Place,* 462 U.S. 696 (1983) permitted a warrantless seizure based on probable cause where there was no invasion of privacy. Similarly, cases like *Segura* and *Mincey v. Arizona*, 437 U.S. 385 (1978) have permitted

warrantless seizure of property based on probable cause *only* where the occupants were not at home.[3]

Indeed, temporary seizure of property is permissible absent exigent circumstances (as per *Mincey* and *Place*) where the owner's *use* of the property is frustrated. However, as this Court noted in *Segura*, there is a substantive difference between interference with privacy and with possessory interests. In that case, this Court suggested that *in the event of an invasion of privacy interests, warrantless police action based solely on probable cause cannot be justified absent exigent circumstances*. *Segura,* 468 U.S. at 811-12. This dictum led to the conclusion that "absent exigent circumstances," the police's initial entry into the defendants' premises "may have constituted an illegal search, or interference with petitioners' privacy interests." *Id.* As discussed above, the police action in this case was a clear violation of Mr. McArthur's privacy interests, since his person and his effects were open to view by Officer Love throughout the duration of the impoundment.

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3 Moreover, in *Segura v. United States*, 468 U.S. 796, 811 (1984), the Court did not address, much less authorize, an invasion of privacy interests. The Court was focused on the seizure aspect of the police conduct, acknowledging that "absent exigent circumstances," any *entry* into the premises "may have constituted an illegal search." *See* 3 Wayne R. LaFave, *Search and Seizure* §6.5(c), at 366 (3d ed. 1996).

2. Exigent circumstances did not exist in this case

The invasion of privacy in this case cannot be justified by any genuinely exigent circumstances. First, the *theoretical* risk that evidence will be destroyed is not enough to support warrantless impoundment of a residence where the occupant is at home – much less warrantless entry of the residence without informed consent. In opposition to this view, petitioners' supporter cites numerous cases for the proposition that warrantless seizure based solely on probable cause is permissible under the Fourth Amendment. None of these cases, however, involves a situation in which the owner or occupant of the dwelling was at home and under observation. *See, e.g., Mincey*, 437 U.S. 385.

Furthermore, cases such as *United States v. Jeffers*, 342 U.S. 48 (1951), *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *Chambers* do not involve private residences, where the expectation of privacy is at its highest. In this case, by contrast, Mr. McArthur was in his home and had every expectation of privacy. *See Karo*, 468 U.S. at 714 (holding that "private residences are places in which the individual normally expects privacy free of governmental intrusion"). As discussed above, this Court has not articulated an instance in which the *privacy* interests of a defendant may be violated based solely on probable cause and absent exigent circumstances.

With respect to the existence of exigent circumstances in this case, no greater than a theoretical risk of evidence destruction existed until the police unnecessarily asked Mr. McArthur if they could search his trailer.[4] Before this request, the only way Mr.

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[4] It is worth noting that the *Segura* court acknowledged that the theoretical risk of evidence destruction was not enough to create

(continued...)

McArthur would have thought to destroy the evidence would be if he had suspected his wife might tell the officers about the drugs under his couch. This is a strained theory, one that does more to justify the officers' conduct after the fact than to illustrate any reasonable suspicion they might have had at the time. Crucially, it fails to explain why Mr. McArthur made no attempt, before the police asked to search his trailer, to destroy the 2.3 grams of marijuana or the drug paraphernalia – despite the fact that he was aware of a police presence for quite some time.

Second, police cannot, through their own conduct, create exigent circumstances justifying a warrantless entry where none otherwise existed. *See United States v. Thompson*, 700 F.2d 944 (5th Cir. 1983). In this case, the police testified that they had probable cause to arrest Mr. McArthur and/or obtain a search warrant as soon as Mrs. McArthur advised them that her husband had marijuana inside his trailer. Jt. App. 24. Instead of arresting Mr. McArthur or obtaining a warrant immediately, the police chose to knock on Mr. McArthur's door, tell him his wife had seen

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[4] (...continued)
a causal link between police misconduct and preservation of evidence. Here, had the police not prompted the destruction of the evidence through their communications with Mr. McArthur, the possibility of the destruction of the marijuana would have been speculative at best. If the "speculative" possibility of destruction of evidence was not enough to taint the evidence in *Segura*, it is difficult to see how the "speculative" possibility of destruction of evidence in this case could possibly give rise to the even higher standard needed for exigent circumstances. *Segura*, 468 U.S. at 815-16. *See also Vale v. Louisiana*, 399 U.S. 30, 35 (1970) (holding that evidence must be "in the process of destruction" in order to justify warrantless entry and search of a dwelling); *People v. Smith*, 496 P.2d 1261, 1263 (Cal. 1972) (holding that "in the absence of a showing of true necessity–that is, an imminent and substantial threat to life, health, or property–the constitutionally guaranteed right to privacy must prevail").

marijuana in his trailer, and ask if they could search the premises.[5] Jt. App. 16. When he refused the request to search, the police asked Mrs. McArthur, within earshot of Mr. McArthur, whether she would accompany one of the officers to a magistrate to obtain a search warrant. Jt. App. 16-17, 26. Had the police not taken this course of action, the risk of evidence destruction would have remained theoretical.

IV. PERMITTING THE POLICE CONDUCT IN THIS CASE WOULD BE CONTRARY TO PUBLIC POLICY, AS IT WOULD CONDONE SERIOUS INVASIONS OF PRIVACY AT MINIMAL BENEFIT TO LAW ENFORCEMENT

1. The police had at least three alternatives to impoundment

What is especially troubling about the police's course of action in this case is how easily it could have been avoided. Before the police created the exigent circumstances that supposedly necessitated their impoundment of Mr. McArthur's premises, they could easily have obtained a search warrant on the strength of Mrs. McArthur's testimony before a magistrate. To the extent that the purpose of the warrant requirement is to prevent "unnecessary intrusions into private dwellings... [by] agents of the government who seek to enter the home for the purposes of search or arrest," this would have been a much more reasonable course of action. *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984). It is ironic that the unhurried process of obtaining a search warrant functioned to

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5 The point of this argument is not to discourage consent searches *per se*, but merely to illustrate the lack of exigent circumstances in this case.

compromise Mr. McArthur's privacy interests rather than to protect them.

As an alternative to obtaining a warrant without impounding the premises, the police could have arrested Mr. McArthur and apprised him of his Miranda rights.[6] When asked at trial why he did not arrest Mr. McArthur, Officer Love admitted he had probable cause to arrest but gave the following response:

> Because, at that point, sir, I, through my training, we had probable cause, I felt, due to Mrs. McArthur's statement, that I felt it was best to wait until we got the search warrant to find the evidence.

Jt. App. 24. Even when counsel repeated the question, Officer Love replied:

> Again, my training and experience, I felt that if we could get the search warrant that it would be proper to wait until we found it.

Jt. App. 24. These evasive replies suggest that the course of action taken by Officers Love and Skidis lacked a reasonable justification. Rather than arrest Mr. McArthur on probable cause, the officers

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6 The fact that the police did not have an arrest warrant does not refute this point. First, this requirement only applies to *entry* of private premises for the purpose of making an arrest, which may not have been necessary in this case given that Mr. McArthur exited his trailer after the police arrived. *See Payton v. New York*, 445 U.S. 573, (1980). *See also Sheik-Abdi v. McClellan*, 37 F.3d 1240 (7th Cir. 1994). Second, an exception to the arrest warrant requirement is triggered where the police have another lawful basis to obtain entry onto the premises, such as, in this case, to keep the peace while Mrs. McArthur collected her belongings. *See* LaFave, *supra*, §6.1(c).

chose to knock on Mr. McArthur's door, tell him his wife had seen marijuana in his trailer, and request a search so that they could have the luxury of solving their case before effecting an arrest.[7] Jt. App. 16. No doubt anticipating that this request would be denied, thus leading to the apparent need for impoundment of the premises, Officers Love and Skidis acted recklessly with respect to their constitutional duty to respect Mr. McArthur's privacy.

Even after the police created the exigent circumstances supposedly necessitating impoundment, they still had an opportunity to arrest Mr. McArthur instead of impounding his premises. Again, however, the officers chose to defer arrest so that they could solve their case. While one officer barred Mr. McArthur from entering his home unaccompanied and kept him under watch for over an hour, the other officer went to a magistrate to obtain a search warrant. Jt. App. 17-18. This invasion of Mr. MacArthur's privacy – done ultimately to confirm the existence of criminal activity which the police already had probable cause to suspect – showed an unnecessary disregard for Mr. McArthur's Fourth Amendment rights. By placing their investigative whims above Mr. McArthur's privacy interests, the police behaved in a constitutionally unreasonable manner.

Even were arrest not feasible – suppose, for example, the only occupant of the trailer at the time was a third party such as Mr. McArthur's mother – the police might have considered an immediate but warrantless search of Mr. McArthur's trailer as an alternative to impoundment. At least one court has rejected impoundment in favor of a warrantless search, where the former "would have

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7 Again, the point of this argument is not to discourage consent searches *per se*. Rather, it is to illustrate that any exigent circumstances in this case were of the police's own making, and that the police had several alternatives to creating the exigent circumstances that ultimately necessitated impoundment.

entailed a much greater intrusion in both space and time" than the latter. *People v. Clements*, 339 N.E.2d 170, 173 (N.Y. 1975). In this case, as in *Clements*, the seizure of evidence did not require a lot of time and was focused on a "predetermined target." The fact that the police immediately resorted to impoundment only illustrates further their indifference toward Mr. McArthur's privacy. As Professor LaFave writes, "[w]here ... only a very limited search in a specific location is needed, it may well be that a warrantless search of that place is so clearly a lesser intrusion that it may be undertaken in lieu of impoundment of the premises until a warrant can be obtained." LaFave, *supra*, §6.5(c), at 373.

2. Permitting the most intrusive alternative would be contrary to public policy

Investigative procedures employed by the police should be the least intrusive means reasonably available to verify or dispel the officer's suspicion. *See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). In this case, Officers Love and Skidis had at least three alternatives to impounding Mr. McArthur's premises and seizing his person: (1) obtaining a search warrant before, and instead of, creating any exigent circumstances; (2) arresting Mr. McArthur and apprising him of his Miranda rights; and (3) conducting an immediate and warrantless search of the premises. All three of these alternatives would have prevented the destruction of incriminating evidence, which is an ongoing and legitimate concern of law enforcement officials.

More to the point, these three alternatives would have spared Mr. McArthur the inconvenience and humiliation of being kept under watch while the police made their case against him. The police demonstrated their indifference to these interests by choosing impoundment in the face of less intrusive alternatives. Given the relatively minor nature of the offenses involved, this choice struck an

unreasonable balance between the interests of law enforcement and the constitutional rights of Mr. McArthur.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges the court to uphold the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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